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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

No. 79-15

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY, a Political Subdivision of the State of California, PEOPLE OF THE STATE OF CALIFORNIA, LEAGUE TO SAVE LAKE TAHOE, and SIERRA CLUB,

Petitioners,

v.

TED JENNINGS, OLIVER KAHLE, HARVEY'S WAGON WHEEL, INC., and COUNTY OF DOUGLAS, a Political Subdivision of the State of Nevada,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

E. ROBERT WRIGHT
Office of the Attorney General
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 445-3323
Attorney for Petitioners
California Tahoe Regional
Planning Agency, and People of
the State of California

GEORGE DEUKMEJIAN,
Attorney General of the
State of California
ROBERT HARVEY CONNETT
and E. CLEMENT SHUTE, JR.,
Assistant Attorneys
General, Of Counsel

LAURENS H. SILVER
SIERRA CLUB LEGAL DEFENSE FUND, INC.
311 California Street, Suite 311
San Francisco, California 94104
Telephone: (415) 398-1411
Attorney for Petitioners
League to Save Lake Tahoe,
and Sierra Club

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	4
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	12
I. THE COURT OF APPEAL'S DECISION POSES CRITICAL ISSUES CONCERNING OBLIGATIONS BETWEEN STATES ARISING BOTH FROM INTERSTATE COMPACT AND FEDERAL COMMON LAW	12
II. BY FAILING TO REVIEW THE ABSENCE AND ADEQUACY OF THE "FINDINGS" MADE BY THE APPROVING AUTHORITY, THE COURT OF APPEAL'S DECISION RELEGATES CRITICAL ISSUES TO POTENTIALLY CONFLICTING INTERPRETATIONS BY DIFFERENT STATES, AND IGNORES THE PRINCIPLES WHICH SUGGEST REQUIRING REASONED FINDINGS TO SUSTAIN ADJUDICATORY DECISIONS UNDER INTERSTATE REGULATIONS	15
A. Interpretation of the TRPA Compact and Ordinance	17
B. Applicable Federal Principles	21
III. THE COURT OF APPEALS ERRED IN HOLDING THAT THIS FEDERAL ACTION IS BARRED BY THE NEVADA 25-DAY STATUTE OF LIMITATIONS	24
IV. THE COURT OF APPEALS ERRED IN HOLDING THAT BECAUSE THE ALLEGED NUISANCE IS ANTICIPATORY AND WAS APPROVED PURSUANT TO COMPACT, A STATE'S FEDERAL COMMON LAW NUISANCE CLAIM MAY BE DISMISSED ON THE PLEADING	27
CONCLUSION	32

APPENDICES 1
APPENDIX A (Court of Appeals Opinion) 1
APPENDIX B (Order Denying Rehearing) 31
APPENDIX C (District Court Opinion) 35
APPENDIX D (Tahoe Regional Planning Compact) 151
APPENDIX E (Tahoe Regional Planning Land Use Ordinance) 173
APPENDIX F (Douglas County Approvals) 241
APPENDIX G (Nevada Procedural Statutes) 263
APPENDIX H (Seventh Circuit Opinion) 267

TABLE OF AUTHORITIES

CASES

Page
American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974) 26
Ashland Oil, Inc. v. Phillips Petroleum Company, 554 F.2d 381 (10th Cir. 1975), cert denied, 434 U.S. 921 26
Burlington Truck Lines v. U.S., 371 U.S. 156 (1962) 23
Burnett v. New York Central R. Co., 380 U.S. 424 (1965) 26
Conley v. Gibson, 355 U.S. 41 (1957) 30
Czaplicki v. The Hoegh Silvercloud, 351 U.S. 525 (1956) 25
Dunlop v. Bachowski, 421 U.S. 560 (1975) 22
Dyer v. Sims, 341 U.S. 22 (1951) 14, 16, 17, 25, 26, 31
Eastlake Community Council v. Roanoke Assoc., Inc., 513 P.2d 36 (Wash. 1973) 26
Florida v. United States, 282 U.S. 194 (1931) 22
Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) 31
Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973) 19
Hinderlider v. La Plata Co., 304 U.S. 92 (1938) 14, 31
Holmberg v. Armbrecht, 327 U.S. 392 (1946) 26
Illinois v. City of Milwaukee, ___ F.2d ___ (No. 77-2246, April 26, 1979) 14, 27
Illinois v. City of Milwaukee, 406 U.S. 91 (1972) 27, 31
Jacobson v. Tahoe Regional Planning Agcy., 566 F.2d 1353 (9th Cir. 1977), *rev'd, sub nom. Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, ___ U.S. ___, 59 L.Ed.2d 401 (1979) .. 19
Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, ___ U.S. ___, 59 L.Ed.2d 401 (1979) 5, 21
League to Save Lake Tahoe v. B.J.K. Corp., 547 F.2d 1072 (9th Cir. 1976) 15
League to Save Lake Tahoe v. Tahoe Reg. Pl., 563 P.2d 582 (Nev. 1977) 8, 25
Leimann v. Board of Adjustment, 88 A.2d 337 (N.J. 1952) 18
Marlatt v. Silk, 36 U.S. (11 Pet.) 1 (1837) 16, 17
Missouri v. Illinois & Chicago District, 180 U.S. 208 (1901) 29
Morgan v. United States, 298 U.S. 468 (1936) 19, 22
Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977) 26
People of St. of Cal. ex rel. Younger v. Tahoe Reg. P. Ag., 516 F.2d 215 (9th Cir. 1975), cert denied, 423 U.S. 868 (1975) 8, 23
Petty v. Tennessee-Missouri Comm'n, 359 U.S. 275 (1959) 14, 16
Schaffer Transp. Co. v. U.S., 355 U.S. 83 (1957) 22
S.E.C. v. Chenery Corp., 318 U.S. 80 (1943) 21
Southern Pacific Co. v. Bogert, 250 U.S. 483 (1919) 26

	Page
Topanga Assn. for a Scenic Community v. County of Los Angeles, 11 Cal.3d 506; 522 P.2d 12 (1974)	20
United States v. El Paso Gas Co., 376 U.S. 651 (1964)	10
United States v. Florida East Coast R. Co., 410 U.S. 224 (1973)	21, 22
U.S. v. Pierce Auto Lines, 327 U.S. 515 (1946)	22
Washington v. General Motors Corp., 406 U.S. 109 (1972)	30
Wichita R.R. v. Pub. Util. Comm., 260 U.S. 48 (1922)	22
STATUTES	
California Code of Civil Procedure	
§ 343	25
Nevada Revised Statutes	
Ch. 11.220	25
Ch. 277.207	5, 25
Ch. 278.020	24
Ch. 278.027	4, 5, 8, 10, 11, 24
Ch. 278.315	24
Ch. 278.317	24
United States Code	
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331(a)	9, 11, 15, 27
28 U.S.C. § 2201	9
CONSTITUTION	
United States Constitution, Article I, Section 10, Clause 3	4
INTERSTATE COMPACTS	
Bi-State Development Agency Compact, Act of August 31, 1950, Ch. 829, 64 Stat. 568	13
Colorado River Compact, Act of December 21, 1928, Ch. 42, 45 Stat. 1057	13
Great Lakes Basin Compact, Act of July 24, 1968, Pub.L. No. 90-419, 82 Stat. 414	13
Potomac River Compact of 1958, Act of October 10, 1962, Pub.L. No. 87-783, 76 Stat. 797	13
Tahoe Regional Planning Agency Compact, Pub.L. 91-148, 83 Stat. 360 (1969); California Govt. Code §§ 66800–66801; Nevada Revised Statutes §§ 277.190–277.200 (1973)	4
Art. I	5
Art. I(b)	18
Art. I(c)	18

	Page
Art. III	8
Art. V(b)(1)	6
Art. VI(a)	6, 18
Art. VI(b)	9
Art. VI(k)	8
Art. VIII(a)	18
Section 5	11, 27
MISCELLANEOUS	
Council of State Governments, Interstate Compacts, 1783–1970 (A Compilation) (1971)	12
Council of State Governments, Interstate Compacts, 1783–1977 (A Revised Compilation) (1977)	12
2 Davis, Administrative Law Treatise (1976 Supp.)	
§ 16.00-2, at p. 385	22
§ 16.00-6, at p. 394	22
Engdahl, "Construction of Interstate Compacts: A Questionable Federal Question", 51 Va.L.Rev. 987 (1965)	12
Frankfurter & Landis, "The Compact Clause of the Constitution—A Study in Interstate Adjustments", 34 Yale L.J. 685 (1925)	14
Supreme Court Rule 19.1(b)	15
Tahoe Regional Planning Agency Land Use Ordinance (1972)	
§ 2.10	6, 19
§ 2.20	18
§ 3	17
§ 4.21	6, 19
§ 4.22	19
§ 7.13	passim
§ 8.25	29
§ 8.27	29
§ 8.33	passim

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, California Tahoe Regional Planning Agency, People of the State of California, League to Save Lake Tahoe, and Sierra Club respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February

15, 1979. That judgment and opinion affirmed a judgment and opinion entered by the United States District Court for the District of Nevada, dismissing petitioners' complaint, and denying petitioners' motions for preliminary injunction and summary judgment.

OPINIONS BELOW

The opinion of the Court of Appeals of which petitioners seek review is reported at 594 F.2d 181; a copy is appended hereto as Appendix A. The court's order of April 16, 1979 denying petitioners' petition for rehearing is unreported; a copy is appended as Appendix B. The district court's opinion is unreported; a copy is appended as Appendix C.

JURISDICTION

The Court of Appeals' judgment was entered on February 15, 1979. A petition for rehearing was denied on April 16, 1979 (App. B). This petition is being filed within 90 days of said date. This court has jurisdiction to review the judgment in question by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. This is an action to enjoin the development of three large hotel-casinos together with massive parking garages, located immediately across the state line, at Lake Tahoe in Nevada. Under the compact between California and Nevada approved by Congress, the Tahoe Regional Planning Agency (TRPA), adopted a regional plan and land use ordinance to protect the fragile ecol-

ogy of the Lake Tahoe Basin from excessive and inappropriate development. Petitioners alleged that the projects, ranging in height from 100 to 193 feet, are in violation of several sections of the TRPA Land Use Ordinance, including a section limiting height to 40 feet unless the approving agency "determines" that greater project height will better promote the protection of the environment, and another section prohibiting approval unless it is "found" that there will not be any substantial environmental harm as a result of the development. Though the Court of Appeals determined that two of the projects were approved based on "findings" merely reiterating the language in the ordinance, and that in the case of the other project, no "findings" were made at all, it held that the questions of whether reasoned findings and substantial evidence supporting the approvals are required, are issues of law of each party-state to the compact, rather than ones of interpretation of the interstate compact and ordinance.

A. When a regulation adopted by a compact-created interstate agency requires local agencies acting pursuant to delegated powers as permit-issuing authorities to "find" and "determine" specified facts prior to making adjudicatory approvals in the interstate region, are the adequacy of the findings and supporting evidence and the legal effect of the absence of findings independently determined by the law of each party state or instead determined by uniform interpretation of the interstate regulation?

B. Are reasoned findings and substantial evidence required to sustain such adjudicatory approvals?

C. Is an action in federal court, challenging the

adequacy and absence of findings and evidence to sustain such adjudicatory approvals barred by a 25-day statute of limitations of one party-state, Nev. Rev. Stat. Ch. 278.027?

2. Petitioners also alleged that the development of the projects would have massive adverse impacts on the Lake Tahoe Basin shared by California and Nevada, sufficient to cause an interstate nuisance enjoinable under federal common law. The Court of Appeals held, interpreting the express language of the compact, that the compact by its own terms preserves the federal common law nuisance remedy. Nevertheless, the court in affirming the dismissal on the pleading, held that equitable relief may not be sought when the alleged nuisance has been approved pursuant to a compact, and is prospective.

A. Does an interstate compact which preserves the federal common law nuisance remedy nevertheless preclude consideration of a claim for equitable relief to enjoin a prospective nuisance which has received a permit under the regulatory program created by the compact?

STATUTES INVOLVED

The statutes involved are these:

1. Article I, Section 10, Clause 3 of the Constitution of the United States, providing: "No State shall, without the consent of Congress . . . enter into any agreement or compact with another State . . ."

2. The Tahoe Regional Planning Agency Compact, Pub.L. 91-148, 83 Stat. 360 (1969); California Govt. Code

§§ 66800–66801; Nevada Revised Statutes (hereinafter NRS) Chs. 277.190–277.200 (1973). The text of the compact, contained in Pub.L. 91-148, is set out *verbatim* in Appendix D.

3. The Tahoe Regional Planning Agency Land Use Ordinance. The ordinance is part of the record, and is set out *verbatim* in Appendix E.

4. Nevada Revised Statutes, Chs. 278.027 and 277.207, are set out *verbatim* in Appendix G.

STATEMENT OF THE CASE

In 1968, California and Nevada entered into a compact (App. D), to create an agency to regulate and control development in the Lake Tahoe Basin, for the purpose of exercising effective environmental controls to prevent further deterioration of the region. (Compact Article I). On December 18, 1969, Congress approved the compact, adding Sections 2 through 7.

The reason for the legislative concern is that Lake Tahoe's scenic beauty, pristine clarity, and size is matched by only two other lakes in the entire world—Crater Lake in Oregon and Lake Baikal in the Soviet Union. *See, Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency,* ___ U. S. ___, 59 L.Ed.2d 401, 405, n. 2 (1979).

The compact created an interstate agency, the Tahoe Regional Planning Agency, and required it to adopt a regional plan governing, *inter alia,* the uses of land, air, space, and other resources within the region, including "an indication or allocation of maximum population

densities." (Compact, Article V(b)(1)). The TRPA was also required by the compact to adopt ordinances implementing the regional plan through regionally enforceable minimum standards, including zoning and air pollution regulations. (Compact, Article VI(a)).

The TRPA adopted its regional plan on December 22, 1971, and adopted its land use ordinance (LUO) (App. E) on February 10, 1972.

The ordinance explicitly requires compliance with its land use, land coverage, and height standards, as well as its other sections. LUO §§ 2.10, 4.21. These other sections include 8.33 which provides that it must be "found" as a condition of approval that the proposed development will not cause any substantial harmful environmental consequences. Additionally, Section 7.13 limits building height to 40 feet unless the permit-issuing authority "determines" that a greater height will better promote the protection of the environment. The ordinance delegates the initial adjudicatory decision-making authority to the appropriate county in the first instance, subject to review by the TRPA.

Respondents Jennings, Kahle, and Harvey's own parcels of land within Douglas County, and within TRPA's jurisdiction.[1] Douglas County, Nevada exercised its delegated authority under the ordinance to approve each of the hotel-casinos proposed by the respective

[1] Petitioners seek no review or relief against Park Cattle Co., a defendant below. The state plaintiffs had abandoned their appeal against Park in the Ninth Circuit. Unlike the three other landowners, Park obtained a building permit and has constructed its building.

respondents. The heights of the proposed projects range from 109 feet to 193 feet, the number of hotel rooms from 446 to 960. The respective projects would include parking structures housing from 1400 to 2850 cars, would include show rooms, and gaming areas ranging from 32,350 to 50,000 square feet. The number of employees of each establishment would range from 1400 to 2575. The proposed developments are each approximately 20 acres in size.

The Harvey's property abuts the California stateline; the Jennings and Kahle properties are less than one mile from California.

The approval by Douglas County of the Hotel Oliver (Kahle) occurred on April 24, 1973; the approval of the Tahoe Palace Hotel (Jennings) occurred on May 7, 1973; and the approval of Harvey's occurred on June 20, 1973.

In approving the Jennings and Kahle projects, the Douglas County Commissioners simply adopted resolutions furnished by the developers' representatives repeating *verbatim* the language of ordinance sections 7.13 and 8.33. With respect to the project of Harvey's, no "findings" relating to sections 7.13 and 8.33 were made at all. The Douglas County minutes reflecting the approvals are appended in Appendix F.

After the Douglas County approvals, the TRPA staff reviewed the projects and recommended that because of too intensive use of the sites, generation of excessive traffic, and excessive height, each project should be disapproved by TRPA. (Record, Pl. exh. 2 doc. 16, exh. 3 doc. 20, exh. 4 doc. 13). However, on July 25, 1973, a

TRPA motion to approve the Harvey's project failed by a 6–4 vote in favor of the project, a majority of the California delegation voting against. The project was therefore "deemed approved", pursuant to Articles III and VI(k) of the Compact. On July 25, 1974, the TRPA voted 7–3 to deny the projects of Jennings and Kahle, but under the default voting rules, a default approval occurred because the 3 votes to approve constituted a majority of the five Nevada members. *People of St. of Cal. ex rel. Younger* v. *Tahoe Reg. P. Ag.,* 516 F.2d 215 (9th Cir. 1975), *cert. denied,* 423 U.S. 868 (1975).[2]

On August 16, 1974, petitioner League to Save Lake Tahoe filed suit in a Nevada state court (Douglas County Action No. 6566) against respondents, alleging that the approvals of the projects by Douglas County were in violation, *inter alia,* of sections 7.13 and 8.33 of the ordinance. (Record, Def. exh. 38). The case, though timely filed, was dismissed for failure to meet a corporate filing requirement. The merits of that case were never reached, and the application of petitioner California Tahoe Regional Planning Agency to file an amicus curiae brief in support of the League to Save Lake Tahoe was denied for that reason. (Record, Clerk's tr. at p. 259). The procedural dismissal was affirmed by the Nevada Supreme Court, which held that refiling was now barred by a Nevada 25-day limitation statute, Nev. Rev. Stat., Ch. 278.027. *League to Save Lake Tahoe* v. *Tahoe Reg. Pl.,* 563 P.2d 582 (Nev. 1977).

[2] In *Younger,* the Ninth Circuit held that there was no final TRPA action in this situation.

Following the May 1977 affirmance by the Nevada Supreme Court, petitioners, on August 12, 1977, filed complaints in the United States District Court for Nevada against respondents.[3] Petitioners alleged that the approvals of respondents' projects were in violation of sections 7.13 and 8.33 of the ordinance and that the approvals were not supported by either legally sufficient findings or substantial evidence. California additionally alleged that the adverse environmental impacts in California of the Nevada projects when completed, including the large volume of generated vehicular traffic, would be so massive as to constitute an interstate nuisance enjoinable under federal common law. The complaint alleged that both air pollution and its adverse effects are aggravated by altitude (Lake Tahoe is over 6,000 feet in elevation) and that existing violations of federal and state ambient air quality standards would be exacerbated and additional violations would occur as a result of development of each project. Petitioners sought injunctive and declaratory relief. Jurisdiction of the District Court was invoked pursuant to Pub.L. 91-148, 83 Stat. 360 (Compact, Article VI(b)), 28 U.S.C. § 1331(a), as well as 28 U.S.C. § 2201.

Petitioners also filed motions for preliminary injunction and summary judgment pertaining to the ordinance violation claim. Respondents filed motions to dismiss the actions, and opposition to petitioners' mo-

[3] California and the CTRPA were the plaintiffs in one case and the League to Save Lake Tahoe and Sierra Club were the plaintiffs in the other case. The actions were heard together.

tions for preliminary injunction and summary judgment. The State of Nevada originally intervened in the action on the side of respondents, but then obtained modification of its status to amicus curiae, to avoid bringing the case within the exclusive jurisdiction of the Supreme Court. Nevada opposed California, and supported respondents. (Record, Clerk's tr. at 576; Reporter's tr. at p. 239–40).

After argument and introduction of affidavits and documents (but no oral testimony) by each side, the district court, on October 20, 1977, announced its opinion orally (App. C), dismissing the actions and denying petitioners' motions for preliminary injunction and summary judgment. The court held on the merits that respondents' projects were not barred by the height constraints in section 7.13 of the ordinance. The court also held that the actions were barred by the Nevada limitation statute (NRS, Ch. 278.027), and by laches. The court gave no reason for dismissing, on the pleading, the interstate nuisance cause of action. On October 31, 1977, the court entered judgments in favor of respondents and signed findings and conclusions (App. C) prepared by respondents' counsel without change, and in the absence of advance service of the documents on counsel for petitioners.[4]

Petitioners in both cases appealed to the Ninth Circuit Court of Appeals. The appeals were consolidated and

[4] This Court has noted that such counsel-prepared findings furnish little assistance to a reviewing court. *See, United States* v. *El Paso Gas Co.*, 376 U.S. 651, 656, n. 4 (1964).

expedited. On September 5, 1978, the Ninth Circuit granted an injunction preventing Harvey's from commencing construction of its parking garage.

In its opinion of February 15, 1979, the Court of Appeals conceded the absence of findings (App. A, p. 7), but held that the issues of whether findings and substantial evidence are required to support issuance of an administrative permit by a local permit-issuing authority are left to the law of each state (App. A, at p. 18, 28, n. 10), and therefore resolution of the issues is barred by the 25-day limitation in NRS, Ch. 278.027. After first determining that petitioners' claims seeking interpretation of the height limitation imposed by § 7.13 were federal questions within the meaning of 28 U.S.C. § 1331 (a), and after holding *sub silentio* that petitioners' claims concerning § 7.13 were not barred by any applicable statute of limitations, the court construed § 7.13 of the ordinance. The court held that § 7.13 does not require that significant height departures be approved only in accordance with the principles that govern the granting of a variance from zoning regulations (App. A, p. 11).

The court also held that the federal common law nuisance claim was properly dismissed. Though the court interpreted Section 5 of the compact not to preclude the application of federal common law nuisance doctrine in the Lake Tahoe Basin (App. A., p. 22), it held that the presence of the compact approval mechanism "affected the viability" of an anticipatory federal common law nuisance action, and affirmed the dismissal on the plead-

ing. (App. A, p. 22, pp. 24, 29, n. 15). The court affirmed the judgment of the district court and lifted its injunction restraining Harvey's from commencing construction.

Petitioners filed petitions for rehearing. The petitions for rehearing were denied on April 16, 1979. (App. B).

Respondents have not obtained building permits and have not commenced construction of the proposed buildings. (Record, P1. exh. 6 docs. J, K and L).[5]

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEAL'S DECISION POSES CRITICAL ISSUES CONCERNING OBLIGATIONS BETWEEN STATES ARISING BOTH FROM INTERSTATE COMPACT AND FEDERAL COMMON LAW.

"During recent years, the interstate compact has become an increasingly prominent device for the solution of governmental problems not confined to a single state." Engdahl, "Construction of Interstate Compacts: A Questionable Federal Question,", 51 Va.L.Rev. 987, 988 (1965).

More than 70 of the 175 compacts now in effect have created administering boards, commissions, and agencies.[6] More agencies would be created by compacts pres-

[5] Jennings and Kahle did obtain Douglas County grading permits, issued illegally—prior to TRPA review in 1973. Jennings also obtained a "foundation" permit containing a waiver of responsibility by Douglas County in 1975. Harvey's obtained building permits for internal modifications to existing structures not relevant here, and a "foundation only" permit in 1977 for the parking garage (the subject of the Ninth Circuit restraining order).

[6] *See* generally, Council of State Governments, Interstate Compacts, 1783–1977 (A Revised Compilation) (1977); Council of State Governments, Interstate Compacts, 1783–1970 (A Compilation) (1971).

ently under consideration. There is not one state in the entire nation which is a party to fewer than 12 compacts.

Interstate agencies are important, active, and make decisions affecting millions of Americans. As examples, interstate agencies regulate the environmental quality in the Great Lakes area [7], conserve fishing resources of the Potomac River [8], control development of the St. Louis metropolitan area [9], and apportion waters of the Colorado River.[10]

The Court of Appeals has held in this case that adjudicatory decisions having broad regional implications, rendered pursuant to powers delegated by interstate compacts and regulations, are not subject to uniform judicial review within the region governed by a compact. By requiring judicial review pursuant to state law of critical aspects of the administrative process, the decision ignores the elementary principle that the actions of local agencies, acting pursuant to powers delegated under a compact by an interstate agency, should be measured against the same basic legal standards with respect to fundamental administrative law issues. Otherwise, findings may be required in one state but not in another state, to sustain decisions under a common regulation. The decision also ignores the fact that the very essence

[7] Great Lakes Basin Compact, Act of July 24, 1968, Pub.L. No. 90-419, 82 Stat. 414.

[8] Potomac River Compact of 1958, Act of October 10, 1962, Pub.L. No. 87-783, 76 Stat. 797.

[9] Bistate Development Agency Compact, Act of August 31, 1950, Ch. 829, 64 Stat. 568.

[10] Colorado River Compact, Act of December 21, 1928, Ch. 42, 45 Stat. 1057.

of a compact intended to protect natural resources is to ensure that "vigilance by one state" is not "thwarted by inaction, or lax administration, in an adjoining state." Frankfurter & Landis, "The Compact Clause of the Constitution—A Study in Interstate Adjustments", 34 Yale L.J. 685, 699 (1925).

This petition also seeks review of the Court of Appeal's decision affirming the dismissal of the state petitioner's interstate nuisance claim on the pleading, on the ground that the federal common law does not provide a remedy for an anticipatory nuisance arising from an activity approved pursuant to an interstate compact. The decision is in conflict with the Seventh Circuit's recent decision in *Illinois* v. *City of Milwaukee,* ___ F.2d ___ (No. 77-2246, April 26, 1979), holding that when previously existing rights are preserved pursuant to federal legislation, "the federal common law of nuisance provides a peculiarly appropriate remedy", when neighboring states allege "that the requirements imposed pursuant to federal statute are inadequate to protect their interests." The Seventh Circuit decision is appended in Appendix H.

A key function of this Court is "to determine the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the 'federal common law' governing interstate controversies." *Dyer* v. *Sims,* 341 U.S. 22, 28 (1951). Review of questions arising in such contexts is appropriate by certiorari. *Petty* v. *Tennessee-Missouri Comm'n,* 359 U.S. 275, 278 (1959); *Hinderlider* v. *La Plata Co.,* 304 U.S. 92, 101,

110 (1938).

The Court of Appeals has clearly decided important questions of federal law, discussed *infra*, which have not been, but should be, decided by this Court. Supreme Court Rule 19.1(b).

II. BY FAILING TO REVIEW THE ABSENCE AND ADEQUACY OF THE "FINDINGS" MADE BY THE APPROVING AUTHORITY, THE COURT OF APPEALS RELEGATES CRITICAL ISSUES TO POTENTIALLY CONFLICTING INTERPRETATIONS BY DIFFERENT STATES, AND IGNORES THE PRINCIPLES WHICH SUGGEST REQUIRING REASONED FINDINGS TO SUSTAIN ADJUDICATORY DECISIONS UNDER INTERSTATE REGULATIONS.

This Court has never decided whether judicial review of administrative decisions made pursuant to an interstate regulation must take place pursuant to "federal" or uniform law, or in the alternative is left to the separate, independent, and often conflicting rules of the party-states.

Assigning to the courts of the individual signatory states the power to determine, as a matter of state law, whether findings are required under interstate regulations, the adequacy of findings, and the quantum of evidence necessary to sustain such findings poses grave difficulties for the functioning of interstate regulatory programs.[11] Yet this is exactly what the Court of Appeals

[11] No doubt, this is why the Ninth Circuit previously held that questions concerning the interpretation and application of TRPA ordinances ordinarily present federal questions under 28 U.S.C. § 1331(a). *See, League to Save Lake Tahoe* v. *B.J.K. Corp.,* 547 F.2d 1072 (9th Cir. 1976).

has done.

This Court has already held that the rules applicable in compact cases are of an "international" character, not left to the party-states. *Petty* v. *Tennessee-Missouri Comm'n,* 359 U.S. 275, 280–81 (1959); *Dyer* v. *Sims,* 341 U.S. 22, 28–31 (1951); *Marlatt* v. *Silk,* 36 U.S. (11 Pet.) 1, 22–23 (1837).

In *Dyer* v. *Sims,* 341 U.S. 22 (1951), the Court reversed a state court decision which had held that state legislation authorizing participation in a compact was in violation of the State Constitution. The Court said:

> "But a compact is after all a legal document. Though the circumstances of its drafting are likely to assure great care and deliberation, all avoidance of disputes as to scope and meaning is not within human gift. Just as this Court has power to settle disputes between States where there is no compact, it must have final power to pass upon the meaning and validity of compacts. It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between states by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States. A State cannot be its own ultimate judge in a controversy with a sister State. To determine the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the 'federal common law' governing interstate controversies (*Hinderlider* v. *La Plata Co.,* 304 U.S. 92, 110), is the function and duty of the Supreme Court of the Nation." 341 U.S. at 28.

Here, for the first time, operation and interpretation

of a regulation adopted by an interstate agency is involved in addition to interpretation of the compact itself. The rationale, however, of decisions such as *Marlatt* v. *Silk* and *Dyer* v. *Sims,* requires that principles applicable to the construction of compacts also be applicable to the construction of interstate regulations.

In *Dyer* v. *Sims,* this Court rejected a proposition designed to avoid compact obligations by transposing an issue from one of compact interpretation into one of state law interpretation. In contrast, the Ninth Circuit decision overlooks the federal common law nature of the administrative law questions raised and thereby would allow a party-state to modify its compact obligations by unilateral judicial or legislative action.

In this case, any obligation to support approvals made pursuant to the Compact with findings does not stem from Nevada state law or local ordinance, but arises pursuant to the TRPA land use ordinance applicable throughout the region. Certain procedural details such as time and place of hearing may properly be left to local law. *See,* LUO § 3 (definition of "Administrative Permit"). But issues as to whether findings and substantial evidence are required or whether *verbatim* "findings" are sufficient, require examination of the obligations assumed by the parties to the compact—as reflected in the ordinance adopted by the interstate agency. It is precisely such questions which require uniform interpretation rather than relegation to the independent and potentially conflicting decisions of each party state.

A. Interpretation of the TRPA Compact and Ordinance.

A uniform requirement for findings explaining the rationale for adjudicatory approvals pursuant to the TRPA ordinance is suggested by the language of the

compact and ordinance, this Court's previous interpretations of similar regulations, and the reciprocity element involved in zoning control.

A primary purpose of the compact is to remedy deficiencies of existing environmental control. Compact, Article I(b). This purpose is to be accomplished by creating "an area-wide planning agency with the power to adopt and enforce a regional plan of resource conservation and orderly development, *to exercise effective environmental controls*. . . ." Compact, Article I(c) (emphasis added). The provisions of the compact and ordinance are expressly required to be liberally construed to effectuate their purposes. (Compact, Art. VIII(a); LUO § 2.20.)

Under the Compact, the TRPA is mandated to promulgate uniform minimum standards applicable throughout the region. The political subdivisions of the individual states are empowered to establish higher or equal standards than those promulgated by the TRPA, but the individual states or their political subdivisions cannot promulgate or enforce standards lower than those promulgated by the TRPA in its ordinances. (Compact, Art. VI(a).) These uniform standards include the criteria in sections 7.13 and 8.33.

Section 7.13 requires a "determination" of express conditions to support a height variance.[12] In the more

[12] "It is basic to the fundamental purpose of zoning that the power of a local board . . . to grant variances should be exercised sparingly and only in exceptional circumstances, and ordinarily only when relief can be granted 'without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance' . . . . A grant of variance which has the effect of frustrating the general scheme and is tantamount to a usurpation of the legislative power reserved to the governing body of the municipality to amend or revise the plan cannot be sustained." *Leimann* v. *Board of Adjustment,* 88 A.2d 337, 339 (N.J. 1952) (Brennan, J.).

intense use districts such as the tourist commerical district involved in this case, height is critical since when operating together with land coverage requirements, the effect is a form of bulk limitation, controlling the total intensity of use. Section 8.33 requires that certain matters be "found" before a permit is issued. In the case of both § 7.13 and § 8.33 the conditions specified go to the heart of the purpose for the compact—environmental protection. The ordinance requires compliance with all of its requirements, whether substantive or procedural. LUO §§ 2.10, 4.21. The burden of proof is on the applicant. LUO § 4.22.

This Court held that the F.P.C. must explain its action in rejecting objections to a bond issue under Section 204 of the Federal Power Act, where that act requires the F.P.C. to only make such order if it "finds" certain conditions. *Gulf States Utilities Co.* v. *FPC,* 411 U.S. 747, 763 (1973). This Court reached a similar result with respect to the requirement to "determine" in *Morgan* v. *United States,* 298 U.S. 468, 479–80 (1936).

Findings are crucial here because thousands of other Lake Tahoe Basin landowners have been significantly restricted in the use of their property, in order to implement the salutary purposes of the compact. *See, Jacobson* v. *Tahoe Regional Planning Agcy.,* 566 F.2d 1353, 1357–58 (9th Cir. 1977), *rev'd, sub nom. Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency,* __ U.S. __, 59 L.Ed.2d 401 (1979). What is particularly striking is that the thousands of landowners restricted to rural property uses will only benefit if the scenic beauty of the

area is protected as intended by the legislation. To the extent massive developments, laying claim to the remaining finite resources in the basin to accommodate further development, are approved without clear evidence that they satisfy the environmental criteria of the ordinance, there will be adverse impacts upon restricted landowners, and interference with more natural public uses. As the California Supreme Court has stated:

> "Moreover, courts must meaningfully review grants of variances in order to protect the interests of those who hold rights and property nearby the parcel for which a variance is sought. A zoning scheme, after all, is similar in some respects to a contract; each party foregoes rights to use its land as it wishes in return for the assurance that the use of neighboring property will be similarly restricted, the rationale being that such mutual restriction can enhance total community welfare. [Citation omitted.] If the interest of these parties in preventing unjustified variance awards for neighboring land is not sufficiently protected, the consequence will be subversion of the critical reciprocity upon which the zoning regulation rests." *Topanga Assn. for a Scenic Community* v. *County of Los Angeles,* 11 Cal. 3d 506; 522 P.2d 12, 19 (1974).

The Court of Appeals declined to review the adequacy of the "findings" and the evidence in support of the "findings". It also declined to interpret Sections 7.13 and 8.33 of the Ordinance to decide whether no findings at all, as a matter of law under the ordinance, are legally adequate.

Enforcement of a uniform requirement of reasoned

findings is the only way to insure that interstate agencies and their delegatees, which are beyond the control of the states, remain within the confines of the jurisdiction conferred upon them with the consent of Congress. Without such enforcement, the provisions of the TRPA ordinance become subject to a *de facto* veto at the state level, contrary to this Court's characterization of TRPA's rules in *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency,* __ U.S. __, 59 L.Ed.2d 401, 411 (1979) ("Moreover, while TRPA, like cities, towns, and counties, was originally created by the States, its authority to make rules within its jurisdiction is not subject to veto at the state level.").

B. Applicable Federal Principles.

Even aside from the language of the TRPA ordinance, "[t]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *S.E.C.* v. *Chenery Corp.,* 318 U.S. 80, 94 (1943).

Here we deal with non-APA, adjudicatory action—the actual application of a rule to a specific set of facts rather than rule-making. *See, United States* v. *Florida East Coast R. Co.,* 410 U.S. 224, 245 (1973). This Court has never decided whether findings and substantial evidence are required to support the adjudicatory decisions rendered by agencies operating under interstate compact. However, the general rule is that findings are required to sustain adjudicatory decisions. Prior to the adoption of the Administrative Procedure Act in 1946, the numerous cases requiring findings were founded in

either common law or the constitution. 2 Davis, Administrative Law Treatise, § 16.00-2, at p. 385 (1976 Supp.); *United States* v. *Florida East Coast R. Co.,* 410 U.S. 224, 242 (1973).

Basically, "findings and reasons are part of a bundle of anti-arbitrariness devices, and often the other sticks in the bundle are dependent upon findings and reasons." 2 Davis, Administrative Law Treatise, § 16.00-6, at p. 394 (1976 Supp.).

The requirement is for "basic" findings to support the decision. The mere quoting of the statutory language is insufficient. *U.S.* v. *Pierce Auto Lines,* 327 U.S. 515, 533 (1946); *Morgan* v. *United States,* 298 U.S. 468, 480 (1936); *Florida* v. *United States,* 282 U.S. 194, 215 (1931). In *Schaffer Transp. Co.* v. *U.S.,* 355 U.S. 83 (1957), this Court held that an interstate commerce commission order must be set aside because the administrative record did not disclose the factors which the ICC compared, in concluding that existing rail service was "reasonably adequate" in denying an application by a motor carrier.

In *Dunlop* v. *Bachowski,* 421 U.S. 560 (1975), the Court held that a statement of reasons was required supporting a determination to not bring a Labor Management Reporting and Disclosure Act enforcement action.

> "[A] 'reasons' requirement promotes thought by the Secretary and compels him to cover the relevant points and eschew irrelevancies . . ." *Id.* at p. 572.

The Legislature is constitutionally enjoined to prescribe a findings requirement when delegating adjudicatory decision-making authority. *Wichita R.R.* v.

Pub. Util. Comm., 260 U.S. 48, 58–59 (1922). The courts can not determine whether the legislative standard has been satisfied by agency action, in the absence of disclosure of the basis for the action. *Burlington Truck Lines* v. *U.S.,* 371 U.S. 156, 167–68 (1962). *Post hoc* rationalization by the courts or other excusing of the lack of findings is incompatible with judicial review and leads to judicial usurpation of the administrative function. *Id.* at 168–69.

It has already been held that "if the local authorities violate the variance guidelines and other ordinances in granting permits, either state as well as the TRPA has the right to bring action in state or federal court seeking compliance with the regional plan and the TRPA regulations. See Article VI(b)." *People of St. of Cal. ex rel. Younger* v. *Tahoe Reg. P. Ag.,* 516 F.2d 215, 219, n. 5 (9th Cir. 1975), *cert. denied,* 423 U.S. 868 (1975). Yet in the absence of an administrative record disclosing the grounds for the decision, there is no procedure by which the issue of administrative "compliance" can be determined.

Since the APA does not treat interstate agencies, it is proper for this Court to turn again to accepted administrative law principles—whether of "common law" or "constitutional" origin—to require the making of an adequate administrative record for judicial review of adjudicatory actions rendered pursuant to interstate regulations. This would necessarily include findings setting forth a contemporaneous explanation of an agency adjudicatory action of the type involved here.

In conclusion, findings are particularly necessary, in the case of permits issued pursuant to interstate regulations because the individual party states do not control the compact agency. Douglas County furnished no explanation why respondents' projects merited approval under §§ 7.13 and 8.33 of the ordinance. In this context, the suspicion, engendered by unexplained decisions, of arbitrary administrative action is magnified in the other party-states. It is wrong to countenance a situation in which findings and substantial evidence may be required in one location, but not in another location, to support decisions made under the same regulation.

III. THE COURT OF APPEALS ERRED IN HOLDING THAT THIS FEDERAL ACTION IS BARRED BY THE NEVADA 25-DAY STATUTE OF LIMITATIONS.

Nevada Revised Statutes Ch. 278.027 (App. G) expressly pertains only to decisions granting "any special use or variance authorized by NRS 278.010–278.630, inclusive." But the compact is codified at NRS 277.190–277.200. These sections are not within the sections specified within the limitation statute. Douglas County granted "Administrative Permits" authorized and required solely by the compact and TRPA Ordinance, not local special use or variance permits contemplated by such sections as NRS Ch. 278.020, 278.315, and 278.317. Chapter 278.027 was adopted in 1971, more than one year after the compact became effective, and would have included the compact sections within the sections specified, if that had been the intent. In 1971, the Nevada Legislature expressly mentioned the compact sections

when drafting procedural provisions applicable to TRPA matters. Nevada enacted NRS Ch. 277.207 (App. G) requiring the expediting of all cases "in which there may arise a question of the validity of any matter under the provisions of NRS 277.190 to 277.200, inclusive . . .".

There is another missing element as well. The Court of Appeals stated that "appellants also assert that section 278.027 requires the filing of notice of final action with the clerk or secretary of the local permit issuing authority after the default approval and that no such filing was made with Douglas County in this case." (App. A, at p. 20, 29 n. 13.) In fact no filing was made anywhere. The filing is expressly required by the limitation statute and is obviously the act triggering the running of the statute. The Court of Appeals erred in following the Nevada Supreme Court decision in *League to Save Lake Tahoe* v. *Tahoe Reg. Pl.*, 563 P.2d 582 (Nev. 1977) which did not even discuss the filing question. A state court determination affecting a compact obligation is not binding upon the federal courts. *Dyer* v. *Sims,* 341 U.S. 22, 28–31 (1951). The surprising and expansive *post hoc* construction of a seemingly inapplicable limitation statute, should not bar this action.

The only Nevada statute of limitation arguably applicable would not bar the action. NRS Ch. 11.220 provides "Any action for relief not herein before provided for, must be commenced within 4 years after the cause of action shall have accrued." This limitation is identical to the California catch-all statute contained in Code of Civil Procedure section 343. The four year statute and the federal equitable doctrine of laches are the apparent potential limitations in view of the silence of the Compact and ordinance.

However, the applicability of any state statute of limitation to an action such as this even if coverage is intended is doubtful. *Holmberg* v. *Armbrecht,* 327 U.S. 392 (1946) and *Occidental Life Ins. Co.* v. *EEOC,* 432 U.S. 355, 366–72 (1977), hold that state limitations do not bar federal actions enforcing federal claims for equitable relief, or seeking vindication of public rights. The applicability of state statutes of limitation to actions brought to enforce interstate obligations has never been decided by this Court. Considerations of uniformity and the "international" nature of the applicable law, *Dyer* v. *Sims, supra,* suggest that state limitation acts should not be applicable to such actions.[13]

The complexity of the compact issues, the several intervening TRPA Compact decisions, and the previous diligent attempt to litigate the issues in the Nevada state courts compel reaching rather than avoiding the merits presented in this case.[14]

[13] Though the Court of Appeals made no ruling as to laches, laches should not bar this action. Here there has been no construction, and no building permits have been issued for the improvements in question. In view of the prior litigation which gave notice of the claims and the absence of prejudicial reliance, the district court clearly erred in sustaining the laches defense on the pleading. *See Czaplicki* v. *The Hoegh Silvercloud,* 351 U.S.525, 533–34 (1956).

[14] *See, American Pipe and Construction Co.* v. *Utah,* 414 U.S. 538, 554 (1974) (purpose of limitation act in giving notice of claim had been met); *Burnett* v. *New York Central R. Co.,* 380 U.S. 424 (1965) (3-year FELA statute tolled because of pendency of state court action on the same claim); *Southern Pacific Co.* v. *Bogert,* 250 U.S. 483, 489–90 (1919) (prior litigation gave notice of claims); *Ashland Oil, Inc.* v. *Phillips Petroleum Company,* 554 F.2d 381, 392 (10th Cir. 1975), *cert. denied,* 434 U.S. 921, 968 (complexity and protracted nature of litigation); *Eastlake Community Council* v. *Roanoke Assoc., Inc.,* 513 P.2d 36, 43 (Wash. 1973) ("Defendants started the project with full awareness that there were multiple, serious legal obstacles and cannot now claim relief simply because money was expended in the face of an awareness they might not have a legal right to proceed.").

IV. THE COURT OF APPEALS ERRED IN HOLDING THAT BECAUSE THE ALLEGED NUISANCE IS ANTICIPATORY AND WAS APPROVED PURSUANT TO COMPACT, A STATE'S FEDERAL COMMON LAW NUISANCE CLAIM MAY BE DISMISSED ON THE PLEADING.

Congress added Section 5 of the Compact providing:

> "[N]othing contained in the Act or in the compact consented to shall in *any* way affect . . . the applicability of *any* law or regulation of the United States in, over, or to the region or waters which are the subject of the compact . . . .". (Emphasis added.)

The federal common law of nuisance is as much a "law" of the United States as are laws of statutory origin. *Illinois* v. *City of Milwaukee,* 406 U.S. 91, 98–100 (1972). Unable therefore to hold that the Compact preempted California's common law claim, the Ninth Circuit nevertheless held that the Compact approval mechanism "affected the viability of" and precluded California's claim anyway. The approval mechanism is the ordinance, which was created by the TRPA. The Ninth Circuit did not explain how the TRPA in an ordinance managed to do exactly what the states did not do and what Congress ruled out in Section 5 of the Compact.

The Seventh Circuit has just issued an interstate nuisance decision in *Illinois* v. *City of Milwaukee,* ___F.2d ___ (No. 77-2246, April 26, 1979). (App. H). Unlike this case, the decision came after trial rather than demurrer. Nevertheless, the holding of the Seventh Circuit concerning the impact of a statutory regulatory program on the "viability" of the federal common law nuisance rem-

edy is in conflict with the Ninth Circuit decision.

The Seventh Circuit held that compliance with a permit issued under the federal water pollution control laws is not a defense to a federal common law nuisance action. (App. H at 292). The court held that the federal laws do not limit the equitable relief that can be granted.

> "If accepted, defendants' argument would reduce a cause of action under the federal common law to no more than an alternative avenue for enforcement of the statute." (App. H at p. 293–94.)

The Seventh Circuit also held that when a state is the plaintiff in a common law nuisance action against a non-state defendant commenced in a trial court (as opposed to this Court), the correct standard of proof is "a preponderance of the evidence rather than clear and convincing evidence". (App. H at pp. 300).

> "While it is appropriate to give weight to Congress' expectations in adopting the Act and the standards established by EPA pursuant to the Act, we cannot forget that Congress deliberately chose to preserve existing rights and remedies. Thus, if the evidence in this case shows that requirements more stringent than those imposed in the NPDES permits are necessary to protect Illinois residents from harm caused or threatened by the defendants' sewage discharges, plaintiffs are entitled to have the more stringent requirements imposed. We can think of no other reason for Congress' preserving previously existing rights and remedies than to protect the interests of those who would be able to show that the requirements imposed pursuant to the federal statute are inadequate to protect their interests. When the complaining party is a neighboring state, the federal common law of nuisance provides a peculiarly appropriate remedy." (App. H at p. 296–297).

Review of the Ninth Circuit decision is clearly called for in view of the conflict between decisions.

The Ninth Circuit said "In so holding [that the interstate nuisance claim is unavailable] we must remember that these projects have passed the gauntlet of approval established by the compact and the ordinance." (App. A, at p. 24). The "gauntlet" is fictional, in light of the absence of findings and evidence in the record to support the approvals. The statement that "the record before the district court manifests the conflicting evidence as to the degree of potential injury" (App. A, at p. 24) is mystifying. The environmental impact analyses prepared with respect to each project required by the TRPA ordinance (LUO §§ 8.25, 8.27) were prepared by the applicants' own consultants. Even so, the reports conceded a number of adverse impacts, including traffic, and air pollution to the point of violating applicable federal standards. (Record, Pl. exh. 2 doc. 3, exh. 3 doc. 3, exh. 4 doc. 3.)

More importantly, the nuisance claim is at the pleading stage—identical for comparison purposes to the demurrer proceedings in the original action in this Court, *Missouri* v. *Illinois & Chicago District,* 180 U.S. 208 (1901). The Ninth Circuit in holding that the nuisance must be proven real and immediate and not doubtful cited, but misapprehended, this Court's decision. This Court held that such tests are irrelevant at the

pleading stage. 180 U.S. at 248–49.

The granting in this case of the motions to dismiss without leave was affirmed. Yet "[a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson,* 355 U.S. 41, 45–46 (1957) (reversing dismissal).

This Court has already discussed air pollution—one of the principal nuisances alleged here:

> "Air pollution is, of course, one of the most notorious types of public nuisance in modern experience . . . [G]eophysical characteristics which define local and regional airsheds are often significant considerations in determining the steps necessary to abate air pollution . . . Thus, measures which might be adequate to deal with pollution in a city such as San Francisco, might be grossly inadequate in a city such as Phoenix, where geographical and meteorological conditions trap aerosols and particulates.
>
> "As a matter of law as well as practical necessity corrective remedies for air pollution therefore necessarily must be considered in the context of localized situations." *Washington* v. *General Motors Corp.,* 406 U.S. 109, 114–16 (1972).

The Court of Appeal's opinion however ignores the obvious, in denying the right of California to attempt to prove its allegations at trial. Considering the world famous scenic beauty of the Lake Tahoe Basin, and the susceptibility of the Basin to air and water pollution, the traffic, water quality, and other impacts arising from "high-rise hotels and their occupants" may indeed, contrary to the Court of Appeal's decision (App. A, at p. 26), constitute an enjoinable anticipatory nuisance.

The basis for the federal common law remedy, is that a state has a quasi-sovereign right to protect its air and forests and other resources from being destroyed or threatened by the acts of persons beyond its control. *Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230, 237-38 (1907).

> "Thus, a State with high water quality standards may well ask that its strict standards be honored and that it not be compelled to lower itself to the more degrading standards of a neighbor." *Illinois* v. *City of Milwaukee,* 406 U.S. 91, 107 (1972).

Here, a state has followed the preference of this Court indicated by the refusal to exercise concurrent jurisdiction in *Illinois* v. *City of Milwaukee,* by first filing this case in the federal district court. It seems singularly inappropriate to now fail to provide the state the benefit of the controlling federal common law principles heretofore established by this Court. There are two means provided by the federal constitution for adjusting interstate controversies; direct litigation is one, while interstate compact is the other. *Dyer* v. *Sims,* 341 U.S. 22, 26–27, 31 (1951); *Hinderlider* v. *La Plata Co.,* 304 U.S. 92, 110 (1938). It is respectfully submitted that when a Court of Appeals errs badly in an interstate controversy, a compelling case for review by this Court is presented.

Here, the Ninth Circuit has construed a compact and ordinance to provide no protection at all. Then, the Ninth Circuit interprets the compact which (1) is intended to protect the environment, (2) preserves fed-

eral common law nuisance remedies, and (3) is to "be reasonably and liberally construed to effectuate the purposes thereof", nevertheless to preclude the opportunity for California to prove interstate nuisance allegations at trial. This turns the compact upside down. This is wrong.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

DATED: July 5, 1979

Respectfully submitted,

E. ROBERT WRIGHT
Office of the Attorney General
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 445-3323
Attorney for Petitioners
California Tahoe Regional
Planning Agency, and People
of the State of California

GEORGE DEUKMEJIAN,
Attorney General of the
State of California

ROBERT HARVEY CONNETT and
E. CLEMENT SHUTE, JR.,
Assistant Attorneys
General, Of Counsel

LAURENS H. SILVER
SIERRA CLUB LEGAL DEFENSE FUND, INC.
311 California Street, Suite 311
San Francisco, California 94104
Telephone: (415) 398-1411
Attorney for Petititioners
League to Save Lake Tahoe
and Sierra Club

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY AND PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiffs-Appellants,

vs.

TED JENNINGS; OLIVER KAHLE; HARVEY'S WAGON WHEEL, INC.; PARK CATTLE CO., and COUNTY OF DOUGLAS,
Defendants-Appellees.

LEAGUE TO SAVE LAKE TAHOE; and THE SIERRA CLUB,
Plaintiffs-Appellants,

vs.

TED JENNINGS; OLIVER KAHLE; HARVEY'S WAGON WHEEL, INC.; PARK CATTLE CO.; DEL WEBB INTERNATIONAL, INC.; COUNTY OF DOUGLAS,
Defendants-Appellees.

NOS. 78-1160
78-1224

OPINION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

Before: MERRILL and SNEED, Circuit Judges, and LINDBERG,* District Judge.

SNEED, Circuit Judge:

Appellants appeal from the district court's grant of appellees' motion to dismiss and denial of appellants' motions for a temporary injunction and for summary judgment in this suit to prevent the construction of four hotel-casinos at the south shore of Lake Tahoe. The appellants are California Tahoe Regional Planning Agency (CTRPA) and the State of California, the League to Save Lake Tahoe (League), and the Sierra Club. The appellees are Douglas County, Nevada, Ted Jennings, Oliver Kahle, Harvey's Wagon Wheel, Inc. (Harvey's), and Park Cattle Co. (Park), five in all. In their complaints, all appellants assert that certain administrative action of Douglas County violated the relevant portion of the California-Nevada interstate compact to regulate the Lake Tahoe Basin. The CTRPA and the State of California allege a second cause of action in which they assert a nuisance under federal common law against all appellees except Park.[1] After a hearing, the district court refused all relief to appellants and granted appellees' motion to dismiss. We affirm.

* Hon. William J. Lindberg, Senior United States District Judge for the District of Washington, sitting by designation.

I. Factual Background.

A. Facts Directly Relevant To This Case.

This case is only the latest in a series of cases, a sketch of which appears below, in which this court has been called upon to intervene in, interpret, or implement the provisions of the Tahoe Regional Planning Compact (Compact). California and Nevada entered into this Compact in 1968 and Congress gave its consent in December 1969. Public Law 91-148, 83 Stat. 360 (1969). The Compact created a regional agency, the Tahoe Regional Planning Agency (TRPA), with powers to regulate and control development within the Lake Tahoe Basin by adopting a regional plan and adopting all ordinances, rules, regulations and policies necessary to effectuate the plan. *See League to Save Lake Tahoe v. Tahoe Regional Planning Agency,* 507 F.2d 517, 518 (9th Cir. 1974), *cert. denied,* 420 U.S. 974 (1975).

As this court previously noted:

> Pursuant to its mandate, the TRPA adopted various procedural regulations and imposed certain land use, height and density restrictions applicable to developments in the Basin. If a builder wanted to develop more than 200 square feet of land or to erect certain types of structures, he was required first to seek a permit from the local permit-issuing authority (generally, the zoning authority of the county in which the construction was to take place). The permit-issuing authority, according to TRPA regulations, was required to adhere to the policies and land

> restrictions adopted by the TRPA but was granted the power to issue variance permits under certain circumstances.

California ex rel. Younger v. Tahoe Regional Planning Agency, 516 F.2d 215, 216 (9th Cir.), *cert. denied,* 423 U.S. 868 (1975). The TRPA can review variance permits issued by local zoning boards, but must act affirmatively to reverse or modify the permit grant by a dual majority within 60 days or the permit is "deemed approved" and the action of the local authority stands. *See California ex rel. Younger v. Tahoe Regional Planning Agency, supra.*

The TRPA adopted the ordinance at issue February 10, 1972. Land Use Ordinance § 7.13 limits the height of buildings in tourist-commercial areas to 40 feet,

> except that the permit-issuing authority, by administrative permit pursuant to Section 8.33, may authorize a greater height to the extent that the permit-issuing authority determines that . . . (4) such greater height will better promote the protection of the environment of the area.

Section 8.33 requires that before issuing an administrative permit, a permit-issuing authority find that the particular use is not detrimental to the general welfare and will not cause substantial environmental consequences.

Each of the four defendant hotel-casino builders received administrative permits issued by the Douglas County Commissioners after hearings and a presentation of evidence. The sizes of the projects ranged in height from 100 feet (Kahle) to 193 feet (Harvey's); in number of hotel rooms from 446 (Park) to 960 (Kahle); and in land coverage from 45% (Kahle) to 75% (Harvey's). Park received the first permit April 20, 1973; Harvey's received its permit, the last of the four, on June 20, 1973. The Douglas County Board issued written findings for the Jennings and Kahle projects which merely repeat verbatim the findings required by the Land Use Ordinance, but issued no written findings with respect to the Harvey's and Park permits. As the next step, the Nevada Tahoe Regional Planning Agency, a state agency empowered to exercise environmental control over gaming establishments in the Nevada side of the Basin, approved each project.[2] Finally, as required by TRPA ordinance, each project was presented to the TRPA for review.[3] In each case the TRPA failed to achieve a dual majority as to the projects, and the projects were "deemed approved." [4] Measured by sixty days from submittal to the TRPA, on September 20, 1973 Harvey's project, the last of the four projects to be so approved, received its so-called "default approval."

The present appeal springs from two separate actions, both filed in federal district court August 20, 1977, almost four years after the default approvals. One count of each complaint charges that each permit was invalid because not in compliance with the 40 foot height limitation in Land Use Ordinance (L.U.O.) § 7.13. California and the CTRPA also claimed that the building of the projects will result in a common law interstate nuisance adversely affecting California and its citizens. Defendants Jennings, Kahle and Harvey's moved to dismiss on numerous grounds without answering the complaints. Park answered and moved for summary judgment. Af-

ter hearing oral argument and accepting submitted evidence, the district court issued its opinion on October 20, 1977, dismissing appellants' actions on several grounds. While these cases were on appeal, this court, on September 5, 1978, granted an injunction preventing Harvey's from commencing construction pending our decision.

B. A Sketch of Prior Litigation.

The present case is only one of several initiated in response to appellees' four projects. Various combinations of plaintiffs and defendants have skirmished inconclusively in both federal and state court. In the first case, filed September 20, 1973, the League and the Sierra Club initiated a suit in federal district court against the TRPA, Harvey's and Park claiming that the TRPA failed to comply with the Compact's requirements and focusing predominantly on the surface coverage provisions adopted by the TRPA. This suit engendered two opinions by this court; neither reached the substance of the claim. Thus, in *League to Save Lake Tahoe v. Tahoe Regional Planning Agency,* 507 F.2d 517 (9th Cir. 1974), after the district court first dismissed the action for lack of subject-matter jurisdiction, we reversed, holding that interpretation of an interstate compact raised a federal question. After remand, in *League to Save Lake Tahoe v. Tahoe Regional Planning Agency,* 558 F.2d 914 (9th Cir. 1977), we reversed a second dismissal seemingly premised upon impermissible joinder. Subsequent to these two reversals, the parties voluntarily dismissed a

third appeal from a denial of a preliminary injunction.

In a second suit, filed August 7, 1974, the State of California attacked the validity of the Jennings and Kahle permits asserting that the permits could not be considered "deemed approved" because the TRPA's vote had failed to yield a dual majority. This court upheld the district court's interpretation of the Compact to the effect that a dual majority was required before any "action" could be taken, and that therefore the failure of a vote to yield a dual majority means that "the local permit issuing authority in effect stands affirmed." *California ex rel. Younger v. Tahoe Regional Planning Agency,* 516 F.2d 215, 219 (9th Cir.), *cert. denied,* 423 U.S. 868 (1975). Afterwards, the district court dismissed the action "pursuant to the opinion and mandate of the United States Court of Appeals for the Ninth Circuit" on October 15, 1975.

The League filed suit against the TRPA and all appellees in Nevada state court on August 16, 1974. It claimed that the permit issuances violated TRPA ordinances and state and local permit requirements. The League asserted the same lack of findings and insubstantial evidence claims raised in the present suit. The trial court dismissed the action in September 1975 because the League failed to qualify to do business as a corporation in Nevada prior to filing the complaint. The Nevada Supreme Court affirmed the lower court, going on to state that refiling would be barred by the Nevada 25-day limitation period (N.R.S. § 278.027) for challenges to local land approvals. *League to Save Lake Tahoe v. Tahoe*

Regional Planning Agency, 563 P.2d 582 (Nev. 1977).

Finally, the League filed suit May 3, 1976 in federal district court contending that air quality certificates for the Jennings and Kahle projects had been issued in violation of the Clean Air Act. Dismissed on jurisdictional grounds by the district court, this suit is presently on appeal to this court. *League to Save Lake Tahoe v. Trounday, Ninth Circuit No. 77-2058.*

II. Issues To Be Resolved In This Appeal.

To dispose of this appeal we must confront four clusters of issues. Initially, we must decide whether we have jurisdiction to consider the issues that this appeal presents. Because we conclude that jurisdiction exists, we then must turn to whether L.U.O. § 7.13 permits projects whose height corresponds to that of the appellees' projects. As we hold that such projects are not unconditionally barred by L.U.O. § 7.13, we then must consider whether the process by which Douglas County approved these permits is subject to attack on any valid grounds. Finally, we shall consider whether California can maintain an action in the circumstances of this case under federal common law for interstate nuisance. To these matters we now turn.

III. Jurisdiction.

Generally, questions concerning the interpretation and application of TRPA ordinances do present federal questions. *League to Save Lake Tahoe v. B.J.K. Corp.,* 547 F.2d 1072, 1075 (9th Cir. 1976). But in *B.J.K. Corp.*

we recognized that questions arising under the TRPA ordinances did not invariably present federal questions; rather we adopted a pragmatic approach to determine "when construction of the Land Use Ordinance itself presents a federal question." 547 F.2d at 1074. The touchstone we fashioned is

> whether interstate conflicts in the interpretation and application of the Ordinance may arise that may substantially affect the effective functioning of the Compact and whether, absent a federal trial forum, existing judicial mechanisms supply a practical means for resolving such conflicts.

Id.

Application of the Ordinance to this case is not difficult. The proper interpretaion of L.U.O. § 7.13 lies at the heart of this litigation. Appellants argue that the 40-foot height limitation is mandatory and that significant departures can be approved only in accordance with the principles that govern the granting of a variance from zoning regulations. Appellees view the matter differently. Were resolution of this dispute left to the courts of Nevada and California differing interpretations of L.U.O. § 7.13 could result. This would impair the effective functioning of the Compact. This is enough to indicate that we have jurisdiction to decide this case.[5]

IV. The Proper Interpretation of L.U.O. § 7.13.

Section 7.13 of the Land Use Ordinance specifies height limitations for projects in the Tahoe Basin.[6] In this case, as already indicated, the applicable limit is 40 feet. The section provides that local permit-issuing au-

thorities can authorize heights in excess of 40 feet *to the extent* that they determine that four factors have been considered, the final one being that the greater height "will better promote the protection of the environment in the area." It further states that only permits for structures of 45 feet or more are subject to TRPA review. Appellants contend that § 7.13 did not comprehend projects such as appellees'. They argue that the section should be read to establish an absolute height limit, or at least to prohibit the material variations present in "high rise" structures.

We begin our analysis with the recognition that "the Compact and the TRPA are *sui generis* offsprings of a marriage between soverign partners. . . ." *California ex rel. Younger v. Tahoe Regional Planning Agency,* 516 F.2d at 218. Section 7.13 cannot be analyzed merely as a traditional zoning ordinance, subject to limited variances. Nor do we think that characterizing the permit as a "special use" permit rather than a "variance" aids the interpretation of L.U.O. § 7.13. Our duty is to interpret the language of the Ordinance in an unstrained manner and in a way that conforms to the design of the Compact.[7] Focusing initially on the Compact, it is clear that it was not designed to stop economic development in the Tahoe Basin. Article I(c) states that the parties sought to create a "regional plan of resource conservation and *orderly development.*" (italics added). The ordinance in question was designed to foster the *orderliness* of development. Does it do so by prohibiting heights significantly in excess of 40 feet? We think not.

In the first place, section 7.13 on its face contemplates heights in excess of 45 feet. Projects in excess of that height are subject to TRPA review. Review would not be necessary if such projects were proscribed. It is not possible to state with certainty that 100 to 200 foot heights were contemplated, but nothing in the ordinance explicitly forbids such heights. At the time the Compact was formed and this Ordinance adopted several structures in the Basin were of a height substantially in excess of 40 feet. This strongly suggests that no maximum height was established in the Ordinance so long as the four conditions set out in § 7.13 are met pursuant to proceedings that conform to L.U.O. § 8.33.[8]

This court previously has recognized that the Compact is not the powerful antigrowth measure that some people would wish it to be. *California ex rel. Younger v. Tahoe Regional Planning Agency,* 516 F. 2d at 220. The process through which section 7.13 was adopted conformed to that required by the Compact. Had it been intended to prohibit all high rise construction that intention surely could have been expressed more clearly. Although many undoubtedly believe that heights in excess of 40 feet cannot possibly "better promote the protection of the environment," the Ordinance does not incorporate that belief. We therefore reject the appellants' interpretation of section 7.13.[9]

V. Attacks On the Douglas County Permits

Under the Compact, the TRPA has delegated the initial permit granting function to local authorities. Such

action is consistent with the jealous retention of sovereignty by the two parties to the Compact. The Douglas County Commissioners issued these permits, pursuant to authority delegated by the TRPA, after applying standards created by the TRPA. Although the Ordinance does not specify the procedures to be used by local permit-issuing authorities, section 3.00 does define an "Administrative Permit" as "A permit issued by a permit-issuing authority *in accordance with its procedures.*" (italics added). The Ordinance thus clearly intended local administrative procedures to apply to the initial issuance. Once issued, § 4.32 subjects these permits to TRPA review, according to the TRPA's own procedures.

A. Reviewability.

Appellants ask us to reach past the TRPA default approval of these projects and to review the validity of the Douglas County permit issuance. Appellees suggest that default approval immunizes Douglas County's issuance from such review. Therefore, we must decide whether under the circumstances of this case the local permit-issuing authority action is subject to review and, if so, under what standards.

We begin by recognizing that this case would present a different question if the TRPA approval was other than by default. In the *Younger* decision, analyzing the "dual majority" requirement of § 4.32, this court stated;

> [T]he TRPA has broad discretion to reject or approve on the merits each building permit request. However, the TRPA's power of de novo review is fully exercised only when a dual majority for or against a proposal is reached.

516 F.2d at 219.

Younger characterized a split vote as no "decision." Although the court stated that the decision of the local authority *in effect* stands affirmed, this only described the operational effect of the TRPA's failure to reach a final decision. This failure should not provide the immunity from review that full de novo review and dual majority approval by the TRPA might. *Younger* teaches that under the circumstances of this case TRPA's power of de novo review was not fully exercised. Nothing in the Compact or Ordinance suggests that when that is the case the processes of the permit-issuing authority must be considered as valid whether in conformity with its own rules or not. In the absence of such a provision, the presence of which would be anomolous in any event, we believe the processes employed by Douglas County are subject to judicial review. Therefore, we reject the appellees' contention that default approvals immunize Douglas County's issuance of the permits from judicial review.

B. Limitations.

We immediately confront an additional problem, however. These actions were filed more than three years after the default approvals. We must decide what limitations period, if any, is applicable. The issue is not a simple one, but we hold that appellants' attack, to the extent it rests solely on compliance with the procedural requirements applicable to Douglas County's issuance

of the permits, is barred by Nevada's limitations provisions.

We recognize that by consenting to the Compact, Congress transformed the agreement of California and Nevada into federal law. *League to Save Lake Tahoe v. Tahoe Regional Agency,* 507 F.2d 517, 523 n. 13 (9th Cir. 1974), *cert. denied,* 420 U.S. 974 (1975); *Jacobson v. Tahoe Regional Planning Agency,* 566 F.2d 1353 (9th Cir. 1977), *cert. granted, sub. nom. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 436 U.S. 943 (1978). Moreover, as already indicated, "questions concerning the interpretation and application of TRPA ordinances present federal questions under 1331(a)." *League to Save Lake Tahoe v. B.J.K. Corp.,* 547 F.2d 1072, 1075 (9th Cir. 1976). But by consenting to the Compact, Congress did no more than incorporate the agreement of the two parties into the body of federal law; it did not make applicable to the agreement the entire panoply of *federal* administrative and substantive standards. It cannot be gainsaid that the understanding of Congress about the meaning of the Compact is important; but the actual agreement of the States is certainly no less so. We believe that the proper balance between the respective sovereigns requires that the intention of the two States, acting through the TRPA, govern the meaning of the L.U.O. to the extent that intention is not in conflict with the Compact itself.

To discover this intent the starting point is that TRPA delegated to local permit-issuing authorities the power to issue administrative permits in accordance with their

normal procedures. L.U.O. § 3.00. A "Permit-Issuing Authority" is the local government which has the authority and obligation to enforce the Ordinance. Each State establishes the authority of, and manner in which, permit-issuing authorities operate. By delegating initial permit issuing to units of local government, creatures of the laws of the individual states, the TRPA recognized the importance attributed by the two States to retention of their substantially unimpaired sovereignty. The TRPA did not seek to establish one uniform procedural process, rather it established a single standard to be applied by state entities according to their traditional land use determination procedure. The TRPA retained, of course, discretionary power to overturn or modify this decision if it so chose.

An integral part of the procedures through which local authorities grant land use permits is the manner for contesting the local administrative decisions. An important component of this is the period within which challenges to an administrative decision can be brought. This period establishes the finality of local land use decisions and thus is part of the "procedures" by which permits are granted. That period should be applicable in this case. Here we do not confront a direct attack on an action of the TRPA or a call for an interpretation of the substance of the Ordinance, for which a stronger argument for a uniform limitations period exists. By leaving intact the normal local land use planning procedures in the case of default approvals, different practices were necessarily foreseen by the draftsmen of the Ordinance.

So long as review of local zoning approvals is not barred altogether or unreasonably restricted by the state review provisions, differences in limitations periods cannot be said to disrupt the effectiveness of the Compact.

Appellants, nonetheless, contend that they assert a federally created right for equitable relief, to which state limitations should not apply. *Holmberg v. Armbrecht,* 327 U.S. 392, 395–98 (1948); *Willis v. Reddin,* 418 F.2d 702 (9th Cir. 1969). That doctrine has no application in this case. Nor can this case be characterized as a federal action seeking the vindication of a public right. *Occidental Life Insurance Co. v. EEOC,* 432 U.S. 355, 366–72 (1977), *aff'g* 535 F.2d 533, 537 (9th Cir. 1976). Here we sit neither as a court in a diversity action, applying state law, nor as a court interpreting a purely federal statutory right and borrowing an appropriate state limitations period. Rather we sit to prevent an impairment of the effective functioning of the Compact. As we see it, this functioning is best promoted by adhering closely to both the letter and the spirit of the Compact and Ordinance.

So inclined, we are convinced that the Ordinance defers issues of local permit issuance validity to state determinations.[10] Only when the state determination misinterprets the Compact or the ordinances, or its procedure fails to provide adequate review to assure compliance with the local procedures, should we impose a federal limitations period whether that period be borrowed or cast in the form of laches. The distinction between the position we occupy in this proceeding and

that when applying a federal statute is underscored when it is remembered that under the Compact each State reserved the power to withdraw from the Compact at any time without federal approval. Compact, Article VIII(c). The states, California and Nevada, are thus the primary source of our charter. It is consistent with this reality ordinarily to allow state procedures to control.

The district court held that these actions were barred by Nevada Revised Statutes § 278.027.[11] That section requires that an action to review a land use classification or any special use or variance authorized by N.R.S. §§ 278.010 to 278.030, inclusive, must be commenced within 25 days of the filing of final notice of the action. Nevada Revised Statutes § 278.025(1) subordinates the powers of local zoning authorities to those of the TRPA, but provides that such local powers shall be exercised wherever appropriate in furtherance of a plan adopted by the TRPA. Thus, administrative permits issued under the delegated powers of the Land Use Ordinance are authorized by the applicable statutory provisions and subject to the 25-day limitation in N.R.S. § 278.027.

This latter statute was construed in the Nevada state court action which was commenced by the League and filed within the 25-day limitation period. In that action, the Nevada Supreme Court, as indicated above, upheld the trial court's dismissal of the action on the ground that the League had failed to comply with a prerequisite for bringing suit, i.e., that the League had failed to qualify to do business as a corporation prior to filing its com-

plaint. *League to Save Lake Tahoe v. Tahoe Regional Planning Agency,* 563 P.2d 582 (Nev. 1977). The court also stated, however, that the League could not refile its suit. The court construed N.R.S. § 278.027 to bar actions commenced more than 25 days *after a permit is "deemed approved" through TRPA inaction.* For the purposes of these proceedings we adopt Nevada's construction of N.R.S. § 278.027. The appellants' challenge of the Douglas County permits in these proceedings are thus barred by N.R.S. § 278.027.[12]

In so holding, we emphasize that effective land use decisions in particular must be reliable. Those who go before administrative agencies with development projects after a certain period should be allowed to rely on a decision rendered by the particular agency. Of course a balance must be struck between the convenience of developers on the one hand and, on the other hand, the public interest in assuring that laws enacted to protect land use planning are not circumvented by cursory administrative action that becomes unreviewable before the public becomes informed. N.R.S. § 278.027, as construed by the Nevada Supreme Court, permits no such circumvention. It bars review of administrative permits granted under TRPA standards unless an action is filed within 25 days of the time that the permit is "deemed approved" by TRPA inaction.[13] A permit is "deemed approved" only if the TRPA takes no action within 60 days of submittal to the agency. When a permit receives a default approval, parties concerned with administrative action of a local permit-issuing authority

in Nevada thus have 85 days from the public filing of the permit by the local permit granting authority with the TRPA to investigate the existence of a cause of action. This minimum 85-day period from local permit issuance is not so short a period that concerned parties are barred effectively from assuring compliance with proper procedures. The fact that one such party managed to meet the deadline on this case indicates the manageability of this limit.

Therefore the Douglas County Commissioners' action cannot be challenged because of an alleged deficiency in its administrative discharge. Inasmuch as the permits were thereafter deemed approved by the TRPA and have been found not to violate the substantive terms of the Ordinance, they are valid in all respects.

VI. Federal Common Law Nuisance Claim.

Finally, we turn to the request by the State of California and the CTRPA that Jennings', Kahle's and Harvey's projects be enjoined on the ground that their development will result in an interstate nuisance. They premise this claim not on any statute, but upon federal common law. The district court dismissed the claim. As we hold that the appellants did not state a claim for common law nuisance under these circumstances, we affirm.

Appellants do not seek to stop an existing activity on the part of appellees that constitutes a nuisance extending across state boundaries. Instead they seek to enjoin a threatened or apprehended nuisance. Before determining whether appellants' action will be such under

these circumstances, we must decide whether this common law remedy has been precluded by Congressional action.

Appellees contend that even if an action for federal common law nuisance exists, such action is precluded either by the Compact itself, the Clean Air Act, or the Federal Water Pollution Control Act (FWPCA). When Congress approved the Compact, it appended Article VIII, § 5 to the Compact specifically providing:

> [N]othing contained in this Act or in the compact consented to shall in any way affect . . . the applicability of any law or regulation of the United States in, over, or to the region or waters which are the subject of this compact. . . .

We believe this provision clearly indicates that the Compact itself does not preclude the application of federal common law nuisance doctrines. However, although the Compact does not affect the applicability of federal common law nuisance principles, the operation of the Compact may influence the factors that should be weighed in applying these principles and doctrines. It is clear, however, that given an appropriate situation, such an action may be maintained.

The federal pollution control laws also do not preclude this action. The Clean Air Act and the FWPCA each have "citizen suits" provisions professing not to "restrict any right which any person . . . may have under any statute or common law . . . ." 42 U.S.C. § 7604(e), 33 U.S.C. § 1365(e). This exclusion is even broader than that present in the Compact. Moreover, the Supreme Court held in 1972 that the FWPCA had

not yet occupied the field, *Illinois v. City of Milwaukee,* 406 U.S. 91 (1972), and courts have continued so to hold even after the enactment of the 1972 amendments. *Illinois ex rel. Scott v. City of Milwaukee,* 366 F. Supp. 298 (N.D. Ill. 1973); *United States ex rel. Scott v. United States Steel Corp.,* 356 F. Supp. 556, 559 (N.D. Ill. 1973); *United States v. Ira S. Bushey & Sons, Inc.,* 346 F. Supp. 145, 149 (D. Vt. 1972), *aff'd,* 487 F.2d 1393 (2d Cir. 1973), *cert. denied,* 417 U.S. 976 (1974). *See United States v. Stoeco Homes, Inc.,* 498 F.2d 597, 611 (3d Cir. 1974), *cert. denied,* 420 U.S. 927 (1975). We decline the invitation to draw a different conclusion.

The Supreme Court has recognized the validity of federal common law nuisance actions instituted by one state to enjoin damaging activities carried on in another. *Illinois v. City of Milwaukee,* 406 U.S. 91 (1972); *Georgia v. Tennessee Copper Co.,* 206 U.S. 230 (1907); *Missouri v. Illinois,* 180 U.S. 208 (1901). And the equitable powers of the federal courts are not limited to stopping nuisances already in operation. Long ago the Supreme Court noted that courts of equity "can, not only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress . . . ." *Mugler v. Kansas,* 123 U.S. 623, 673 (1887). The exercise of these equitable powers, however, requires great certainty, and the standards for enjoining a threatened nuisance are stricter than those for stopping an existing nuisance.[14]

> [I]t is settled that an injunction to restrain a nuisance will issue only in cases where the fact of nuisance is made out upon determinate and satisfactory evidence; that if the evidence be conflicting and the injury be doubtful, that conflict and doubt will be a ground for withholding an injunction; and that, where *interposition by injunction is sought, to restrain that which it is apprehended will create a nuisance* . . . the proofs must show such a state of facts as will manifest the danger to be *real and immediate.*

Missouri v. Illinois, 180 U.S. at 248 (emphasis added).

Appellants assert that appellees' projects indirectly will create a nuisance—that they will attract more people and cars to the Basin, and that inevitably a nuisance will result. We cannot agree. Appellants' allegation is insufficient to establish that the danger of a nuisance in this case is real and immediate. Without more, appellants at this preliminary stage have not met the requirements set forth in *Missouri v. Illinois, supra.* In so holding we must remember that these projects have passed through the gauntlet of approval established by the Compact and the Ordinance.[15] The record before the district court manifests the conflicting evidence as to the degree of potential injury. This court cannot set its face against these facts merely because we as citizens might prefer that all development be barred from the Tahoe Basin. Much of modern life is distasteful, but the federal common law of nuisance bestows upon us no power to root out that which happens to offend both us and a vigorous plaintiff.

Only two previous federal cases have involved threat-

ened nuisances. Neither provides a precedent for what the appellants seek here. In *Missouri v. Illinois, supra,* Missouri brought a direct suit in the Supreme Court to enjoin Illinois and the Sanitary District of Chicago from using a channel built to divert 1,500 tons of untreated sewage a day from Lake Michigan to tributaries which joined the Mississippi River 43 miles above St. Louis. The Court stated that the case involved a bill alleging, in explicit terms, that "damage and irreparable injury would naturally and necessarily be occasioned by acts of the defendants . . . ." 180 U.S. at 248. In this case, no such direct and immediate connection exists. Moreover, by the time the Supreme Court decided the case, the channel had been in operation one year and the real and immediate threat of a nuisance had become a pollutionful reality.

In a more recent case, *Texas v. Pankey,* 441 F.2d 236 (10th Cir. 1971), the Tenth Circuit recognized that a threatened nuisance could be enjoined. It reversed a district court dismissal for lack of jurisdiction of a federal common law negligence action to enjoin the use, both actual and threatened, of a certain pesticide on lands that drained into a river flowing into Texas. Both the district court and the Tenth Circuit Court initially had denied preliminary injunctions. By the time the circuit court issued its opinion holding that federal jurisdiction existed, actual spraying had occurred. To avoid the defendant's suggestion that the suit was moot, the court characterized the action as one to enjoin further spraying. The opinion does not discuss the problems that nor-

mally attend an effort to enjoin a threatened nuisance.

This case is unique. California entered a Compact, later approved by Congress, to help coordinate and control growth and development in the Tahoe Basin. As equal parties in the interstate agency developed under the Compact, California participated in the adoption of a regional plan and ordinances to regulate new construction in the Basin. Pursuant to established procedures the appellants' projects, which do not violate the ordinances' substantive provisions, have been approved. Now California seeks to prevent construction of these projects by invoking the equitable powers of the federal courts to enjoin interstate nuisances. Fundamentally, it contends the projects will harm the environment of the region. This may be so, but not every injury to the environment is a nuisance under the federal common law. A fortiori, not every threatened injury can be enjoined as a potential nuisance. The line is not a bright one, but we cannot consider high rise hotels and their occupants as indistinguishable from untreated sewage, noxious gases, and poisonous pesticides.

We therefore affirm the judgment of the district court and lift our injunction preventing Harvey's from commencing construction.

AFFIRMED.

FOOTNOTES

[1] The State of California and the CTRPA have abandoned their appeal against Park, therefore the federal common law interstate nuisance action remains only against the other appellees.

[2] The Nevada Tahoe Regional Planning Agency (NTRPA) did not come into existence as a functioning legal entity until April 30, 1973, ten days after the Douglas County Commissioners approved the Park permit. Nevertheless, the Park project received approval from NTRPA on June 14, 1973.

[3] Section 4.10 of the Land Use Ordinance specifies two instances in which a permit is required before construction of a project can be commenced: (1) any project that will cover more than 200 square feet; (2) any construction that requires an administrative permit or variance permit under one or more of the substantive requirements of other sections of the Ordinance. Section 4.30 sets out the process for Agency review of these locally issued permits. Permits issued under § 4.10(1) above do not require TRPA review. (§ 4.31). The local permit-issuing authority must notify TRPA of all applications for and issuances of permits. Section 4.34 requires that permits issued under § 4.10(2), such as those at issue in this case, be screened by the TRPA staff for review. The staff then must make a report with a recommendation to the TRPA for its action. Thus review of the permits at issue was mandatory, and the Douglas County Commission was responsible to notify TRPA that the permits had issued.

[4] The TRPA staff recommended denial of the Jennings and Kahle permits, but on July 25, 1974 the TRPA failed to reach a dual majority. Although all five California representatives voted against the projects, three of the five Nevada representatives voted for approval. The Harvey's project also received a negative staff recommendation, but four of five Nevada representatives and two of five California representatives voted to approve the project. Park's project had a positive staff recommendation, but a majority of the California representatives voted against the project.

[5] Because this federal question is substantial, pendant jurisdiction supported the district court's treatment of the attack on the procedural aspects of the Douglas County action. We therefore need not decide whether a simple attack on the administrative grant of a local permit-issuing authority under the Ordinance would itself support federal jurisdiction.

[6] Section 7.13 of the Ordinance provides, in part:

> No building or other structure erected in any land use district shall have a height greater than that specified below except that the permit-issuing authority, by administrative permit pursuant to 8.33, may authorize a greater height to the extent

that the permit-issuing authority determines that (1) provision has been made for protection from fire hazards and against aviation accidents; (2) consideration has been given to the protection of view and to the character of the neighborhood; (3) proper provision has been made for light and air; and (4) such greater height will better promote the protection of the environment in the area. Only those administrative permits that allow a building or other structure of a height of 45 feet or more shall be subject to Agency review pursuant to Section 4.32. . . .

[7] This court previously isolated the task a court must face in approaching the Compact and the Land Use Ordinance:

> California makes a critical error in likening the Compact to ordinary zoning legislation and the TRPA to a typical zoning board. In interpreting the provisions of the unique statutory scheme involved here we must look not to Robert's Rules of Order or decisions dealing with the votes of zoning boards, but instead to the actual language used, as viewed against the backdrop of the Compact's legislative history.

California ex rel. Younger v. Tahoe Regional Planning Agency, 516 F.2d at 218.

[8] Section 8.33 states:

> Administrative permits may be issued for any of the uses or purposes for which such permits are required by the terms of this ordinance. Such permit may be granted only if it is found by the permit-issuing authority that the establishment, maintenance, or operation of the use or purpose in the particular case is not detrimental to health, safety, peace, morals, comfort and general welfare of persons residing or working in the neighborhood of such proposed use, or detrimental or injurious to property and improvements in the neighborhood or to the general welfare of the Region, and will not cause any substantial harmful environmental consequences on the land of the applicant or on other lands or waters.

[9] Appellants make the argument that this Ordinance provision is violated as a matter of law when no trade-off is established between height and land coverage. Because in this case such a trade-off occurred, we do not reach appellants' contention.

[10] Because whether substantial evidence supported the local determination or whether written findings of the local permit-issuing authority are required also are aspects of the local permit-issuing and challenge process, these are issues of state law and not interpretations of the Ordinance. They can therefore be reviewed only to the extent the state procedures allow review, so long as some opportunity for challenge exists.

[11] That section provides:

> 278.027 *Judicial relief, review of actions, decisions of governing bodies: Time for commencement.* No action or proceeding shall be commenced for the purpose of seeking judicial relief or review from or with respect to any final action, decision or order of any governing body, commission or board granting or changing any land use classification or granting any special use or variance authorized by N.R.S. §§ 278.010 to 278.030, inclusive, unless such action or proceeding is commenced within 25 days from the date of filing of notice of such final action with the clerk or secretary of such governing body, commission or board.

[12] We reject the State of California's argument that limitations are not applicable to it because it is a sovereign. Irrespective of the validity of this argument otherwise, California is not a sovereign to enforce procedural compliance with Nevada local land use planning decisions.

[13] Appellants also assert that § 278.027 requires the filing of notice of final action with the clerk or secretary of the local permit-issuing authority after the default approval and that no such filing was made with Douglas County in this case. The Nevada Supreme Court, however, construed the statute to preclude actions commenced more than 25 days after an action was "deemed approved." *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 563 P.2d 582 (Nev. 1977). The court did not discuss the filing question. By holding as it did, however, the court appears not to require a filing subsequent to the default approval. We adopt this view.

[14] The standard courts have applied to threatened nuisances has been distilled in 58 *Am. Jur. 2d* § 147, pp. 724–26:

> [I]t is established that a court of equity may enjoin a threatened or anticipated nuisance, public or private, where it *clearly* appears that a nuisance will *necessarily* result from the contemplated act. . . .
>
> A proposed use of land will not be restrained where it will not *inevitably* constitute a nuisance. If the complainant's right is doubtful, or the thing which it is sought to restrain . . . will not necessarily become a nuisance, but may or may not become such, depending on the use or manner of operation, *or other circumstances*, equity will not interfere.

Id. (emphasis added, footnotes omitted), *citing Missouri v. Illinois*, 180 U.S. 208 (1901).

[15] In holding that the Compact approval mechanism affects the viability of an anticipatory federal common law nuisance action, we do not imply that governmental approval of these projects precludes a nuisance action at such time in the future as California can allege that it clearly appears that a nuisance necessarily will result. We hold only that at this time a prospective nuisance cannot necessarily result from this project which does not conflict with the regional plan adopted by both states under the Compact and which has been approved in compliance with the Land Use Ordinance adopted by the TRPA.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY and PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs-Appellants,

vs.

TED JENNINGS; OLIVER KAHLE; HARVEY'S WAGON WHEEL, INC.; PARK CATTLE CO., and COUNTY OF DOUGLAS,

Defendants-Appellees.

LEAGUE TO SAVE LAKE TAHOE; and THE SIERRA CLUB,

Plaintiffs-Appellants,

vs.

TED JENNINGS; OLIVER KAHLE; HARVEY'S WAGON WHEEL, INC.; PARK CATTLE CO.; DEL WEBB INTERNATIONAL, INC.; COUNTY OF DOUGLAS,

Defendants-Appellees.

NOS. 78-1160
78-1224

ORDER

Before: MERRILL and SNEED, Circuit Judges, and LINDBERG,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Sneed has voted to reject the suggestion for a rehearing in banc, and Judges Merrill and Lindberg have recommended rejection of the suggestion for rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

* Hon. William J. Lindberg, Senior United States District Judge, for the District of Washington, sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

HONORABLE BRUCE R. THOMPSON, JUDGE

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY; and PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs,

vs.

TED JENNINGS; OLIVER KAHLE; HARVEY'S WAGON WHEEL, INC.; PARK CATTLE CO.; and COUNTY OF DOUGLAS,

Defendants.

No. R-77-0158-BRT

LEAGUE TO SAVE LAKE TAHOE; SIERRA CLUB,

Plaintiffs,

vs.

TED JENNINGS; OLIVER KAHLE; HARVEY'S WAGON WHEEL, INC.; PARK CATTLE CO.; DEL WEBB INTERNATIONAL, INC.; COUNTY OF DOUGLAS,

Defendants.

No. R-77-0159-BRT

REPORTER'S TRANSCRIPT OF PROCEEDINGS

VOLUME III

Pages 332 to 525

ALLAN D. BUNNELL,
Official Reporter.

Reno, Nevada, Thursday, October 20, 1977, 9:00 o'clock a.m.

THE COURT: This morning we have two separate actions before the Court: California Tahoe Regional Planning Agency and People of the State of California against Ted Jennings, Oliver Kahle, Harvey's Wagon Wheel, Park Cattle Company and the County of Douglas; and, also, the action of the League to Save Lake Tahoe and the Sierra Club against Ted Jennings, Oliver Kahle, Harvey's Wagon Wheel, Park Cattle Company, Del Webb International, Inc., and the County of Douglas.

Inasmuch as Del Webb International, Inc., has been dismissed as a defendant, the defendants in each case are identical; and the issues involved in each case are identical except insofar as the standing of any particular plaintiff to maintain the action is concerned.

Most of the problems presented in these cases are far from new. Initially, the League to Save Lake Tahoe and others, as plaintiffs, brought an action in the Eastern District of California against the Tahoe Regional Planning Agency and certain individual defendants; Thomas Raley, Park Cattle Company and Harvey's Wagon

Wheel; two of those defendants being involved in the instant actions before this Court.

The thrust of that particular complaint was that the Tahoe Regional Planning Agency itself had failed to comply with the provisions of the Interstate Compact, had conducted itself in violation of the provisions of the Interstate Compact, and had granted approval to the development of projects of the defendants Thomas Raley, Park Cattle Company and Harvey's Wagon Wheel in violation of the Compact.

The legal issue involved in the particular case was whether or not Federal question jurisdiction could be predicated upon an alleged violation of or an alleged misinterpretation of the provisions of an interstate compact. And the opinion of the Ninth Circuit Court of Appeals, written by District Judge Renfrew, sustained jurisdiction under 28 USC 1331 (a) over a case involving the construction of the Tahoe Regional Compact. That case was then returned to the District court for the Eastern District of California for further proceedings. In the meantime the State of California on the relation of the Attorney General of California brought an action in this court entitled People of the State of California on Relation of Evelle Younger, Attorney General, against the Tahoe Regional Planning Agency. The named defendants in that case were Mr. Ted Jennings, who is a defendant in these cases; Mr. Oliver Kahle, who is a defendant in these cases. And in that action it was contended that the granting of administrative permits for the construction of the two hotels contemplated by Mr.

Jennings and Mr. Kahle was in violation of the Interstate Compact, and that they should be enjoined because the constitution of the Tahoe Regional Planning Agency; namely, the Interstate Compact, had to be interpreted so as to ignore the plain language of the Compact and not to give effect to the provision for automatic approval of a proposal where a dual majority against the proposal had not been obtained by vote of the Agency.

I think it is important that we recall the provision of the opinion in 516 F. 2nd 215, as follows:

> "By virtue of Article VI (k), which provides in such a case that the project be deemed approved, the decision of the local permit-issuing authority in effect stand affirmed. Such a reading of the Compact, notwithstanding California's protestations to the contrary, does not gut its provisions nor frustrate its purposes. The District Court's interpretation of Articles III (g) and VI (k), which we affirm, gives effect to the statutory scheme carefully devised by two states reluctant to relinquish very much sovereignty. That the Compact may not be a powerful anti-growth measure in that it permits the majority of one state to stop effective action by the TRPA is not the result of a court-imposed interpretation but of the deliberate action by the Legislatures of Nevada and California and the Congress of the United States.
>
> "This Court is not empowered to rewrite the Compact. California's remedy lies solely with the legislative branches of the parties to the Compact."

I might comment on that statement. As we all know, an effort has been made, and I think the effort is probably still continuing, to reach an accord between the two

state governments with respect to an appropriate modification of the Interstate Compact. As a consequence of the contentions that have been made in this case, it occurs to me that that is not the only possible effective solution to a continuation of the problems which some people, including the plaintiffs, think exist with respect to the administration by the Douglas County Commissioners of the powers granted to Douglas County as the permit-granting authority, not only under the Compact but under the Land Use Ordinance.

The Tahoe Regional Planning Commission is comprised of ten members: A representative of El Dorado County, California; a representative of Placer County, California; a representative of the City of South Lake Tahoe; an appointee by the Governor of California, and a person who—I don't recall the exact name of the California agency, but he is in effect the Director of the Department of Environmental Resources, or something to that effect. He has a counterpart on the Board from the State of Nevada; and the State of Nevada is represented by people from Douglas County, Ormsby County and Washoe County, plus the Governor's appointee and the Director of the Division of Environmental Protection and Natural Resources.

The problem here respecting height limitation is not caused by anything in the Compact; it is created by the formulation of the Land Use Ordinance, which is a product of the Tahoe Regional Planning Agency and is subject to amendment and modification by that Agency.

I imagine that anyone trained in zoning and land use

planning would throw up his hands at the suggestion that I am about to make and say that in any reasonable zoning ordinance you have to have some provisions for flexibility. But situations alter cases; and because of the peculiar situation here, if there is to be any peace in the area of South Lake Tahoe with respect to the possible future proliferation of high-rise-casino development, I think it could be curtailed very effectively by the adoption of an absolute, unchangeable height-limitation ordinance. If there were such an ordinance adopted by the TRPA, we wouldn't have these problems of approval by operation of law because of failure to obtain the dual majority.

If they had an absolute height-limitation ordinance, not subject to variance or not subject to administrative permit, there could be no further high-rise development anyplace in Lake Tahoe.

I recognize that this may not be scientific land use planning, but it may be necessary in these circumstances, and I think it quite possible that such an ordinance could be adopted.

We had a very strong effort by the Nevada Legislature, under the leadership of Governor Mike O'Callaghan, to bring about a change in the Tahoe Regional Compact. Such a change has not finally become effective. But there are two members on the Nevada side who are at least friends of the Governor. One is his direct appointee and the other is an appointee of his as Director of the Environmental and Natural Resources Division of the Nevada government. And there is only

one County Commissioner who has had much interest in maintaining the status quo, and that is the representative from Douglas County.

Geographically, the County Commissioner from Ormsby County might be persuaded to take a very enlightened view of this situation, because the great bulk of Ormsby County that lies in the Tahoe Basin is now in a state park and is not subject to much development anyway. I also think it quite probable that the representative of Washoe County would not be as adamant about control of the casino development in the Washoe County area of Lake Tahoe, as has been evidence by the many actions taken by the Douglas County Commissioners.

So I just throw that out as a possibility of some relief to anybody who thinks this is a serious problem, although I, as you will shortly find out, think that the horse long ago escaped the barn with respect to the four particular projects that are being attacked in this litigation. There may be some hope for the future which does not necessarily involve the State of California and the State of Nevada seeing eye to eye on a modification of the Interstate Compact.

After California was successful or unsuccessful in their effort to emasculate the dual majority provision of the Interstate Compact, despite the fact—and this occurred in November, 1974, when the State of California, at least in its subdivision the California Regional Planning Agency—and I hasten to state that I don't think that the joinder of the California Tahoe Regional Planning

Agency as a plaintiff in this case assists at all with respect to the problems presented. The State of California at that time knew about this footnote, which has been much discussed, in Judge Choy's opinion:

> "California also argues that such an interpretation would allow construction of projects that are in blatant violation of the Regional Plan. Two responses are appropriate. First: that TRPA chose to vest variance-granting power in the local authorities and set up guidelines for them to follow; second, and more important, if the local authorities violate the various guidelines and other ordinances in granting permits, either state, as well as the TRPA, has a right to bring action in State or Federal Court seeking compliance with the Regional Plan and the TRPA's regulations."

I am frank to say I don't know what was meant or contemplated by that statement.

As will shortly become apparent, I have carefully reviewed the TRPA regulations, and it is hard for me to see how in any respect these administrative permits, permitting the construction of the projects under consideration, were obtained in violation of the TRPA's rules and regulations. And if the Court of Appeals by that footnote intended to set up the Federal District Courts as a court of general review over the administration of the Land Use Ordinances of the Tahoe Regional Planning Agency, they are going to have to say it a lot plainer than that. That statement, if it is intended to be effective law, should be the first headnote in the case and not a footnote at the end of the case.

I recognize that under the case of League to Save

Lake Tahoe against B.J.K. Corporation, that if there is presented to the Court a problem of interpretation of the Land Use Ordinance, which has a basin-wide effect, and which calls for uniformity in interpretation and application, that that is a federal question which vests federal jurisdiction in this Court. Consequently, I accept federal jurisdiction in these two cases because of the plaintiff's contention that the Tahoe Land Use Ordinance, as enacted, set up arbitrary height limitations; and that the proper interpretation of the ordinance is that those height limitations were not to be exceeded except in certain exceptional circumstances which required rather elaborate hearings and the production of evidence. So that contention being made, I think that under League to Save Lake Tahoe against B.J.K., we do have a federal question presented which has to be dealt with.

But to get back to the League to Save Lake Tahoe against the Tahoe Regional Planning Agency, after Judge Renfrew and his cohorts on the Court decided that an interpretation of the Compact involved a federal question, the case went back to the Eastern District of California. There were further hearings, and three of the defendants, I believe all three of them; Thomas Raley, Park Cattle Company and Harvey's Wagon Wheel, were dismissed on the theory that they were not necessary or proper parties to the case, if I understand the situation correctly. And it is noted in the Court of Appeals' opinion as follows—the opinion refers to the earlier case that I referred to in 507 F. 2nd 517. It says:

"That case set forth the factual background and we will only briefly summarize the focus of the complaint. Basically appellants brought this action seeking declaratory and injunctive relief, alleging that TRPA has failed in several particulars to comply with the legal requirements of the Compact. As it pertains to the developers, the complaint alleges that TRPA violated the Compact by approving the development projects of Thomas Raley, Park Cattle Company and Harvey's Wagon Wheel, Inc."

The opinion went on to hold that although the individual defendants didn't have any responsibility with respect to the promulgation or administration of the Land Use Ordinances, they were proper parties because it was essential to have them before the Court in order to give effective relief if relief should be granted. But this case is still pending, and with respect to the defendant Park Cattle Company it was recently dismissed by Judge Battin and a motion for preliminary injunction was denied, which was sought to enjoin the very construction projects which these plaintiffs seek to enjoin in this Court.

As Mr. Silver has indicated, this latest decision with respect to Park Cattle Company alone is now going to be before the Court of Appeals again, initially on a motion for an emergency injunctive relief.

Both of the Court of Appeals' opinions in the Sacramento case; that is, the League to Save Lake Tahoe against Tahoe Regional Planning Agency, Park Cattle Company and Harvey's Wagon Wheel, indicate that all the issues that are present before me in these two cases

may very well be involved in those cases in California; that the action is still pending there and that this case here is in reality a duplication.

I can't say specifically from reading these opinions—and I know that there are pleadings and evidence before the Court which clarify the situation somewhat—that the exact contention made here with respect to the interpretation of Section 7.13 of the Tahoe Planning Agency Land Use Ordinance was present before that Court. But if it hasn't been, it should have been, because it is all one ball of wax, and it is pretty hard to talk about not properly promulgating and administering ordinances to enforce the Tahoe Regional Compact, particularly with respect to these two projects, without getting involved in the height of the buildings and the environmental impact that would be caused by the influx of tourists and permanent residents to the South Lake Tahoe area.

In addition to the federal litigation that has been generated by these plaintiffs, we have the case of League to Save Lake Tahoe against Tahoe Regional Planning Agency, Oliver Kahle, Ted Jennings and Harvey's Wagon Wheel. There is a doctrine in criminal law of selective prosecution, and on rare occasions the criminal defendant has been able to have an indictment dismissed because he was able to demonstrate that he was the only person in the area who had been picked out to face a serious charge such as was made against him.

I don't understand why all these cases have all these different defendants. The State of California in this

Court sued Ted Jennings and Oliver Kahle, the League to Save Lake Tahoe in the Eastern District of California sued Harvey's Wagon Wheel and Raley's and Park Cattle Company. They decide to make an effort in the Nevada State Court System and they sue Oliver Kahle, Ted Jennings and Harvey's Wagon Wheel.

I don't understand that the deal that was made, whatever it was, with Park Cattle Company in an earlier case by the League to Save Lake Tahoe that involved it, and which ended up in a dismissal without prejudice, justified leaving Park Cattle Company out of that case; and plaintiff's attorneys apparently didn't believe that that situation immunized Park Cattle Company from becoming a defendant in these two cases.

In the Nevada case the League to Save Lake Tahoe on the face of it was making a very sincere effort to make the system work. They said, "Well, if we had a question here regarding whether these administrative permits should have been promulgated by the Douglas County Commissioners and approved by the Tahoe Regional Planning Agency, the remedy is set up by the Nevada law under the dictates of the Tahoe Regional Planning Ordinance and we will follow that procedure." But unfortunately they stubbed their toe in the course of events and didn't get a determination on the merits, except from one point of view. It is clear to me from the opinion of the Supreme Court of Nevada that with respect to administrative permits granted by Boards of County Commissioners of Washoe, Ormsby or Douglas County, and submitted to the TRPA for approval, the

provisions of Section 278.027 of the Nevada Revised Statutes apply to such administrative permits, and are the method of judicial review provided by the State of Nevada to find out whether the local permit-granting authority had violated the guidelines or the provisions of the various ordinances under which they were required to proceed.

As I indicated yesterday, that section does not limit judicial review to any particular court. I say that because there are statutory provisions in many states which do say that if you are going to review this administrative decision, you have to go into the First Judicial District Court or whatever. But this particular statute permits review of the decision of the Board of County Commissioners granting a variance or special use permit or changing a land use classification to be instituted in any court having jurisdiction; and if federal question jurisdiction is present, this Court would have jurisdiction under that statute.

I have indicated that in view of the contention that Section 7.13 of the Land Use Ordinance provides a definite height limitation, and any departure from it is a variance, I think there is Federal question jurisdiction and this Court would have jurisdiction of such an administrative review within the limitations fixed by the Nevada statute.

These actions were not instituted within twenty-five days after final action by the Tahoe Regional Planning Agency under the interpretation by the Supreme Court of Nevada, as follows:

"If Agency review does occur and TRPA either approves, requires modification of, or rejects the decision of the permit-issuing authority, final action is taken at that point in time and judicial review must be sought within twenty-five days thereafter."

There is another example of the use of the English language which communicates something very definitely to me which seems to escape plaintiff's counsel.

If we are to consider these actions as direct review of the way in which the permit-granting authority handled themselves or itself in these four cases, the actions are barred by the Nevada statute.

I am not going to segregate this discussion according to the types of motions that are before the Court, because most of my comments apply to the motion to dismiss, the motion for summary judgment and also the motion for preliminary injunction. All these cases in varying degrees present very clear instances for the application of the equitable doctrine of laches as a matter of law. Whatever rights the plaintiffs have under their distorted interpretation of the Tahoe Land Use Ordinance were available and readily apparent as soon as the Court of Appeals for the Ninth Circuit promulgated the first Younger opinion.

It has been explained in oral argument, and I will not repeat it here, that the plaintiffs have never effectively sought and followed through with injunctive relief against these projects. Concededly there are precedents in which there have been plain and obvious violations of statutes where it is not necessary, in order to avoid a claim of laches to seek affirmative injunction relief, but

these are not cases of that type.

When the first Younger case was brought, this very contention with respect to the invariability of the height limitations under the Land Use Ordinance might have been included and should have been included in order not to separate or divide the causes of action.

Recognizing that all these problems were novel, and at that time the State of California was primarily interested in the problem of dual majority and what could be done to solve the situation under Subsection (k) with respect to deemed approval of a project where a dual majority vote either for or against had not occurred, and realizing that the opinion of the Court of Appeals for the Ninth Circuit dealt primarily with that problem, I think that if the State at that time had seen fit to seek to file an amended complaint, alleging the matters which it alleges now in these two actions, brought some three or four years later, that would have been permitted, or that even a new action brought at that time making a timely assertion of these contentions would have been permitted. But that was not done. Everyone slept on their rights except the League to Save Lake Tahoe, which if I understand correctly brought two actions in Douglas County and dismissed one and failed to jump a procedural hurdle in the other. But in none of those cases was there any effective effort made to stop the construction of these projects.

Where you do have a situation where plaintiffs are permitting citizens to go ahead in reliance upon permits that have been granted, especially permits that on the

face of them have been approved expressly, not only in the Federal Trial Court, but by a Federal Appellate Court, and substantial sums of money are expended in reliance on those permits, belated and delayed actions such as these two are barred by laches as a matter of law.

At least with respect to two of the defendants, Harvey's and Park Cattle Company, there is another action pending, which may not be barred by laches, in which the plaintiffs can seek to obtain whatever relief they are entitled to.

On the merits, I have listened carefully to the presentations by counsel, have read a good portion of the record before the Court, and I think it is a fair conclusion from the record that with respect to each of the four applications for administrative permits that are involved in these cases, the County Commissioners of Douglas County were required to have presented to them extensive information with respect to the conditions which the Land Use Ordinance, Section 7.13 and Section 8.33, required to be met before any height variation could be granted, except for a five-foot variation. It seems to me that at the time the administrative permits were granted a very serious effort was made to make the decisions required to be made in order to comply with the requirements of Section 7.13 and 8.33 of the Land Use Ordinance; and that there was substantial compliance with the requirements, not only in the presentation of information relevant to the decisions that had to be made, but in making the decisions required to be made by the provisions of the Ordinance.

I know perfectionists, not only among lawyers but on the Court of Appeals, like to criticize findings, and there are sometimes two different ways to criticize them. One is that they parrot the language of the statute or ordinance and, therefore, they can't be genuine; and the other is they didn't parrot the language of the statute or ordinance and therefore they don't comply with the law.

I have read the actions by the County Commissioners in several of these cases and they did both. They stated what had to be found according to the language of the Land Use Ordinance, and also stated other things, which certainly doesn't detract from the fact that there was substantial compliance with all the requirements.

The other aspect of this situation with respect to approval is that plaintiffs would have us ignore the approval by the TRPA.

In my opinion the approval of these four projects, by operation of law so to speak, because the Interstate Compact provides that final action must be taken within sixty days, and if there is not a dual majority approving or disapproving the proposal, the proposal will be deemed approved; that that type of approval is no different in quality or legal effect from approval that had been made by a unanimous vote of all the members of the Agency. I think that is the plain intendment of the first Younger case. It seems to me that when you have administrative processes that are set up by law or regulation and have to be followed in order to acquire a license or privilege to do something with a final administrative

authority passing upon and approving or disapproving what has been done by the subordinate bodies to which the power has been delegated, when there has been such ultimate approval or disapproval by the Agency entertaining that power and authority, the underlying procedures cannot be attacked if they were not attacked successfully before the final approving authority. And in this instance, except for the possibility of judicial review, as indicated in the Nevada statute to which I have alluded, if the Tahoe Regional Planning Agency—not "if," but when it did entertain review of these administrative permits, any objections to the quality of the material and information and procedures before the Douglas County Planning Commission would necessarily be presented to the Agency, and final action by the Tahoe Regional Planning Agency would resolve any deficiencies in those earlier proceedings.

Finally, I would like to comment on the merits in the context of the contentions made by the plaintiffs. I find nothing ambiguous in the height-limitation ordinance 7.13. It is quite plainly different from other types of limitations ordinances. It was quite plainly adopted in contemplation of the probability that many, many requests for different height allowances would be made.

The section refers to the fact that, "No greater height than that specified shall be obtained by any building or structure in any land-use district, except that the permit-issuing authority by administrative permit." And then it goes right on to specify certain general conditions under which the permit-issuing authority may allow a greater height.

Now, we all know, and people who promulgated this ordinance knew, that there were structures at Lake Tahoe, particularly on the south shore, which at that time exceeded forty feet; but we all know, and the people at Lake Tahoe knew, that there was a probability of applications for structures above forty feet, not only above forty feet but double forty feet or triple forty feet or quadruple forty feet; and the types of guidelines that were placed in Section 7.13 for the consideration of the permit-granting authority are types which would be relevant only if considerable heights of building construction were contemplated.

It is my view that in every instance with respect to each of the four defendants the provisions of the Land Use Ordinance of the Tahoe Regional Planning Agency were strictly and carefully followed and complied with, and that there was no violation of those ordinances.

There are other subjects that could be commented upon, but I have got another case scheduled for 10:00 o'clock.

With the exception of certain causes of action against Park Cattle Company, which I believe are the second cause of action in the complaint of the League to Save Lake Tahoe, and the third cause of action in the complaint of the State of California—

Do I have them identified correctly, Counsel?

MR. WRIGHT: Yes.

THE COURT: With those exceptions, the motions to dismiss are granted, and the motions for summary judg-

ment made by the plaintiffs are denied, the motions for a preliminary injunction are denied.

With the exception of the second cause of action of the League to Save Lake Tahoe's complaint and the third cause of action of the complaint by the State of California, the motion of the Park Cattle Company for a summary judgment is granted.

The Park Cattle Company shall have twenty days from this date in which to answer the second cause of action of the League to Save Lake Tahoe's complaint and the third cause of action of the complaint by the State of California.

MR. WRIGHT: Your Honor, I believe they have already answered the complaint.

THE COURT: Have they?

MR. WRIGHT: Yes, your Honor.

MR. BLAKEY: Yes, we have answered, your Honor.

THE COURT: All right. Strike that last comment.

With respect to those two claims for relief; that is, the second in the League's complaint and the third in the State's complaint, the motion for preliminary injunctive relief is denied at this time without prejudice to the right to renew it when, if ever, it becomes apparent that there is an emergency situation which requires prompt action and as to which no other appropriate remedy is available.

Anyone representing any party who has been affected by the Court's rulings will prepare his own order and present it within five days.

MR. WRIGHT: Your Honor, we would like to also

request the Court to accomplish several things for the purpose of the record. One is—

THE COURT: Would you mind coming up to the lectern? When you talk at the book, I can't hear you.

MR. WRIGHT: Yes, certainly, your Honor.

First of all, your Honor, we would like to request the Court to make an order pursuant to FRCP 54 (b), so that there be a final appealable judgment with respect to the claims against the—

THE COURT: That is because you have the peripheral claims against Park Cattle Company?

MR. WRIGHT: That is right.

THE COURT: All right, I will make a 54 (b) certification to clarify the record. You already have one appealable order—

MR. WRIGHT: Yes.

THE COURT: —on the denial of preliminary injunction.

MR. WRIGHT: Yes.

THE COURT: All right.

MR. WRIGHT: Also, your Honor, based upon the same presentation made to the Court—there would not be any need to present new materials—we would, as required by Appellate Rule 8, at this time move the Court for an injunction on appeal.

THE COURT: You may prepare a statement that you requested a stay pending appeal—what you want is really an affirmative injunctive relief pending appeal—

MR. WRIGHT: Yes.

THE COURT: And I denied it.

MR. WRIGHT: Thank you, your Honor. And the final —I say "thank you" as a matter of courtesy.

As the final point, the very last part of the order of the Court read, I am confused about—the Court, as best I took it down, stated that the motion for preliminary injunction was denied without prejudice to renew it when an emergency situation becomes apparent. Is that request for preliminary injunction with respect to that peripheral claim this Court has against Park?

THE COURT: I tried to refer to those two causes of action. The one that relates to the alleged December 16, 1976 modification by the Douglas County Commissioners of the administrative permit.

MR. WRIGHT: That was the League's second claim and the State's third claim.

THE COURT: We have an issue of fact on that with respect to whether there was, in effect, a change.

MR. WRIGHT: That is all, your Honor.

THE COURT: I might state that if I find that, after hearing whatever material you people want to present, that that did change the permit, I will require it to be re-presented. If it didn't, there is no reason for it to be re-presented.

MR. WRIGHT: Also, is it necessary—I don't know the practice in this court. If the Court itself directs expedited preparation of the reporter's transcript, we would request such preparation of the transcript of the Court's opinion this morning.

THE COURT: My court reporter is red-headed and a little bit hard to get along with, and I will let you fight

that out with him, because he has got enough work to do to keep him going for a year.

MR. WRIGHT: Thank you.

MR. SILVER: Your Honor, with regard to the League and Sierra Club case, I would simply like to note for the record that the plaintiffs are joining in the request of the State for Rule 54(b) certification, and that they have joined with the State with regard to a motion for injunctive relief pending appeal.

THE COURT: All right. The 54(b) certification has been granted in both cases, and also the denial of injunctive relief pending appeal.

Do you have anything else?

We will be in recess.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY; and PEOPLE OF THE STATE OF CALIFORNIA

Plaintiffs

vs.

TED JENNINGS; OLIVER KAHLE; HARVEY'S WAGON WHEEL, INC.; PARK CATTLE CO.; and COUNTY OF DOUGLAS

Defendants

NO. CIV. R. 77-0158

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL JUDGMENT

THIS MATTER came before the Court on October 17, 18, and 19, 1977, pursuant to plaintiffs' Motion for Summary Judgment and Motion for Preliminary Injunction, and on various Motions of the defendants, including defendant Jennings' Motion to Dismiss, and the plaintiffs and all defendants having presented evidence and the Court having considered the evidence presented by each party as being available to all parties, and the matter having been argued and briefed and submitted to the Court, and the Court being fully advised in the premises and to the extent that the Court considered matters outside the pleadings, defendant Jennings' Motion to Dismiss was treated as one for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and based on the evidence submitted by plaintiffs and the undisputed evidence and facts submitted by defendants, the Court finds and concludes as follows:

FINDINGS OF FACT

1. That on or about May 7, 1973, the Douglas County Commissioners, the permit-issuing authority pursuant to the TRPA Land Use Ordinance, issued an administrative permit to defendant Jennings approving his project and allowing a height greater than 40 feet; that prior to issuing said administrative permit to defendant Jennings, the Douglas County Commissioners required the presentation of extensive evidence in support of such additional height pursuant to § 7.13 and § 8.33 of the

TRPA Land Use Ordinance.

2. That the Douglas County Commissioners, prior to the issuance of said administrative permit, fully complied with all provisions of all applicable ordinances and regulations including §§ 7.13 and 8.33 of the TRPA Land Use Ordinance.

3. That there was submitted to the Douglas County Commissioners, prior to the issuance of the above referenced administrative permit, substantial evidence pursuant to §§ 7.13 and 8.33, and upon such substantial evidence the Douglas County Commissioners made written findings which provided, *inter alia,* that "such greater height will better promote the protection of the environment in the area"; that the administrative record before Douglas County contained substantial evidence to support such findings.

4. That said permit was subsequently submitted to and approved by the Nevada TRPA, and thereafter was submitted to the TRPA for review; that on or about the 24th day of July, 1974, a hearing was held on the Jennings administrative permit before the TRPA at which time the governing body did not obtain a dual majority vote to approve, modify or reject the Jennings project, and that on or about August 12, 1974, the Jennings administrative permit was deemed approved by operation of law pursuant to the terms of the TRPA Compact and Land Use Ordinance.

5. That at the time of the adoption of the Land Use Ordinance there existed in the area where defendant Jennings' project is to be constructed several high-rise

structures, including structures which were higher than the project proposed by defendant Jennings; at that time it was common knowledge that under the said Land Use Ordinance, and particularly § 7.13, there would be structures many times higher than 40 feet or 45 feet.

6. That the plaintiffs herein did not appear at the hearing before the Douglas County Commissioners when the Jennings administrative permit was issued. Plaintiff League to Save Lake Tahoe made an appearance before the NTRPA and the TRPA at the time of the hearing on defendant Jennings' permit. However, at no time did any of the plaintiffs herein raise any issue or contention that the Jennings project was in violation of § 7.13 or 8.33 of the Land Use Ordinance.

7. That in processing defendant Jennings' application for administrative permit the provisions of the TRPA Land Use Ordinance were strictly and carefully followed and that the administrative permit is valid and was, when issued, valid, and was valid on its face.

8. That after the administrative permit of defendant Jennings became final on or about August 12, 1974, defendant Jennings in good faith, relied on that administrative permit and has expended the sum of approximately $7,000,000 in furtherance of his project; that plaintiffs, with full knowledge, allowed defendant Jennings to proceed in reliance upon his administrative permit which was valid on its face.

9. That on September 2, 1975, defendant Jennings was issued a building permit for grading and excavation on

his project. On October 14, 1975, Jennings received a building permit for foundations for his project. Pursuant to these permits the grading and excavation on the project was substantially completed, and the foundations and footings were constructed; and that the costs of construction in reliance on said permits was approximately $2,000,000.

10. That plaintiff, State of California, on or about August 7, 1974, filed suit in federal District Court entitled State of California ex rel Evelle Younger, Attorney General, versus Tahoe Regional Planning Agency, et al, case number R-74-108 BRT, (hereinafter referred to as the "Younger case"), which action attacked the validity of the administrative permit issued to defendant Jennings and alleged, *inter alia,* that defendant Jennings' project if constructed "will be in violation of the TRPA Ordinance on land use intensity and height limits".

11. That on or about August 16, 1974, plaintiff League to Save Lake Tahoe filed suit number 6566 in Douglas County, Nevada, (hereinafter "Douglas County" case), which action attacked the administrative permit issued to defendant Jennings and alleged, *inter alia,* said permit was issued in violation of §§ 7.13 and 8.33 of the TRPA Land Use Ordinance, was not supported by substantial evidence and therefore was arbitrary, capricious and contrary to law.

12. That on or about June 5, 1975, California petitioned the Douglas County Court to file an *amicus curiae* brief in the Douglas County action.

13. That on or about May 3, 1976, plaintiff League to

Save Lake Tahoe filed a suit in federal District Court under the Clean Air Act, case number R-76-85 BRT, entitled League to Save Lake Tahoe v. Roger S. Trounday, et al (hereinafter referred to as the "Trounday case"), which suit sought to enjoin defendant Jennings' project.

14. That the Younger action was appealed to the Ninth Circuit Court of Appeals and the appellate Court first issued its opinion on April 30, 1975, and amended the same on June 11, 1975.

15. That none of the plaintiffs at any time have effectively sought and followed through with injunctive relief against defendant Jennings' project.

16. That all actions and claims set forth in the within action were available, apparent, and known to plaintiffs at the time of the filing of the Younger suit in August of 1974, and the within claims could and should have been included therein.

17. That all causes of action and all claims set forth in the within matter were available, apparent and known to plaintiffs at the time of filing the Douglas County case on August 16, 1974.

18. That the plaintiffs delayed an unreasonable period of time in commencing the within action.

19. That any objections that a building higher than 40 feet violated § 7.13 of the Land Use Ordinance should have been made by plaintiffs in the permit-issuing procedures and at the hearings before the Douglas County Commissioners, the Nevada Tahoe Regional Planning Agency, and the TRPA.

20. That after the decision of the Ninth Circuit Court of Appeals in the Younger case, plaintiffs made no attempt to amend their Complaint or file another action setting out the claims included in the within action.

21. That the Douglas County action was dismissed against the League to Save Lake Tahoe with prejudice, which dismissal was affirmed by the Nevada Supreme Court on May 3, 1977.

22. That additional delay in the construction of Jennings' project will result in substantial increase in the total cost of construction.

23. That the language of § 7.13 of the TRPA Land Use Ordinance is not ambiguous.

CONCLUSIONS OF LAW

1. The Court has subject matter jurisdiction pursuant to 28 U.S.C. 1331(a).

2. That defendant Jennings' administrative permit was approved by operational law by the TRPA on or about August 12, 1974, which approval has the same legal effect as an approval by the unanimous vote of the governing body of the TRPA.

3. That plaintiffs' claims against defendant Jennings are barred by NRS 278.027.

4. That plaintiffs' claims against defendant Jennings are barred by the doctrine of *laches* as a matter of law.

5. That plaintiffs' claims against defendant Jennings are barred by the doctrine of *res judicata*.

6. That in issuing the administrative permit to defendant Jennings, Douglas County complied with all ap-

plicable local, state and TRPA ordinances, rules and regulations, and said permit was validly issued and is presently valid.

7. That defendant Jennings has a vested right to complete construction of his project in accordance with the terms of his building and administrative permits.

8. That the Land Use Ordinance § 7.13 is not ambiguous and plainly contemplates applications for, and the granting of, heights substantially in excess of 40 feet if the conditions of § 7.13 and § 8.33 are met.

9. That Douglas County made adequate findings that defendant Jennings' project meets all the conditions of §§ 7.13 and 8.33 of the Land Use Ordinance, and said determinations and findings are supported by substantial evidence in the record.

10. That even if there were any deficiencies in the proceeding before Douglas County, those deficiencies were resolved and corrected before the TRPA and by the approval of Jennings' administrative permit by operation of law.

11. That the plaintiffs' claims against defendant Jennings were not timely raised or asserted before the various administrative bodies that reviewed the Jennings administrative permit, and that therefore the plaintiffs have failed to preserve said claims for judicial review and the within action is barred for the failure of plaintiffs to exhaust and timely assert available administrative remedies.

12. That the First and Second Causes of Action against defendant Jennings fail to state a claim for which relief

can be granted.

JUDGMENT OF DISMISSAL

Pursuant to the Findings of Fact and Conclusions of Law set forth above, and good cause appearing, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. That the Motion of plaintiffs for Preliminary Injunction be and the same hereby is denied.

2. That the Motion of plaintiffs for Summary Judgment be and the same hereby is denied.

3. That the Motion of defendant Jennings to Dismiss the First and Second Claims for Relief be and the same hereby is granted.

4. That the First and Second Claims for Relief are dismissed with prejudice and judgment is entered in favor of defendant Jennings together with costs.

DATED this 31st day of October, 1977.

BRUCE R. THOMPSON
U.S. District Judge

BREEN, YOUNG, WHITEHEAD & HOY,
Chartered
232 Court Street
Reno, Nevada
(702) 786-7600

Of Counsel:

Charles D. Stein
Donald E. Egan
Lee Ann Watson
Katten, Muchin, Gitles,
Zavis, Pearl & Galler
55 East Monroe St., Suite 4100
Chicago, Illinois 60603
(312) 346-7400

Attorneys for Defendant,
Oliver Kahle

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY AND PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs,

v.

TED JENNINGS; OLIVER KAHLE; HARVEY'S WAGON WHEEL, INC.; PARK CATTLE CO.; and COUNTY OF DOUGLAS,

Defendants.

Civ. R.
77-0158 BRT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Plaintiffs in the above entitled matter have heretofore filed a motion for Summary Judgment and have also requested a Preliminary Injunction against Defendant, Oliver Kahle, hereinafter referred to as "Kahle."

Defendant, Kahle, has heretofore filed herein his Motion to Dismiss Plaintiff's Complaint.

The hearing on all of the said motions did come on before the above-entitled Court on the 17th, 18th, and 19th days of October, 1977.

All parties were represented by counsel, and voluminous evidence was adduced on behalf of all parties; the matter was extensively briefed and argued; and the Court being fully informed does hereby make its Findings of Fact, Conclusions of Law, and enters its Judgment of Dismissal.

FINDINGS OF FACT

1. That the Douglas County Commissioners, the Permit Issuing Authority, prior to issuing to Defendant, Kahle, the Administrative Permit, pursuant to Section 8.33 of the Land Use Ordinance of the Tahoe Regional Planning Agency, required the presentation of extensive evidence for Defendant, Kahle's, project pursuant to Land Use Ordinance Section 7.13, providing for greater height, and Section 8.33, the Section authorizing the issuance of Administrative Permits.

2. That there was submitted to the Douglas County Commissioners, prior to the issuance of the said Administrative Permit, substantial evidence pursuant to

Section 7.13. That the evidence so submitted to the Douglas County Commissioners showed that (1) provision has been made for protection from fire hazards and against aviation accidents; (2) consideration has been given to the protection of view and to the character of the neighborhood; (3) proper provision has been made for light and air; and (4) such greater height will better promote the protection of the environment in the area.

3. That the Douglas County Commissioners, prior to the issuance of the said Administrative Permit, made a serious and determined effort to comply with the provisions of Sections 7.13 and 8.33 of the Land Use Ordinance of the Tahoe Regional Planning Agency.

4. That the height of Defendant, Kahle's, project is between 70 feet and 100 feet.

5. That the Douglas County Commissioners made written findings that (1) provision has been made for protection from fire hazards and against aviation accidents; (2) consideration has been given to the protection of view and to the character of the neighborhood; (3) proper provision has been made for light and air; and (4) such greater height will better promote the protection of the environment in the area.

Said findings were both in the language of Section 7.13, and in language not in the specific language of Section 7.13.

6. That there was submitted to the Douglas County Commissioners, prior to the issuance of the said Administrative Permit, substantial evidence pursuant to Section 8.33; that the evidence so submitted to the Doug-

las County Commissioners showed that the establishment, maintenance or operation of Defendant, Kahle's, project is not detrimental to the health, safety, peace, morals, comfort and general welfare of persons residing or working in the neighborhood of such proposed use, or detrimental or injurious to property and improvements in the neighborhood or to the general welfare of the Region, and will not cause any substantial harmful environmental consequences on the land of the applicant or on other lands or waters.

7. That the Douglas County Commissioners made written findings that the establishment, maintenance or operation of Defendant, Kahle's project, is not detrimental to the health, safety, peace, morals, comfort and general welfare of persons residing or working in the neighborhood of such proposed use, or detrimental or injurious to property and improvements in the neighborhood or to the general welfare of the Region, and will not cause any substantial harmful environmental consequences on the land of the applicant or on other lands or waters.

8. That the Douglas County Commissioners, prior to the issuance of said administrative permit, did fully comply with Sections 7.13 and 8.33 of the Land Use Ordinance.

9. That at the time of the adoption of the Land Use Ordinance there existed in the area where Defendant, Kahle's, project is to be constructed several existing highrise structures considerably higher than Defendant, Kahle's, project.

10. That the members of the Tahoe Regional Planning Agency at the time of the adoption of the Land Use Ordinance, February, 1972, contemplated that there would be numerous applications requesting a height much greater than 40 feet or 45 feet.

11. That at the time of the adoption of the said Land Use Ordinance it was common knowledge that under the said Land Use Ordinance, and particularly Section 7.13, there would be structures many times higher than 40 feet or 45 feet.

12. That at none of the hearings on Defendant, Kahle's, permit, including the hearing before the Tahoe Regional Planning Agency, was any contention made that a project higher than 40 feet violated Section 7.13, the height Section of the Land Use Ordinance, or that a variance should have been applied for under Section 8.34 of the Land Use Ordinance.

13. That in the processing of Defendant, Kahle's application for an Administrative Permit the provisions of the Land Use Ordinance were strictly and carefully followed.

14. That the Administrative Permit of Defendant, Kahle, is valid and was, when issued, valid, and was valid on its face.

15. That in reliance upon the Administrative Permit Defendant, Kahle, has expended substantial funds and incurred substantial costs.

16. The Plaintiffs, with full knowledge of Defendant, Kahle's, action, permitted Defendant, Kahle, to proceed and to rely upon the Administrative Permit which was

valid on its face.

17. Plaintiff, State of California, on August 7, 1974, filed a suit in the above-entitled Court, entitled State of California ex rel. Evelle Younger, Attorney General, vs. Tahoe Regional Planning Agency, et al, number R 74-108 BRT, attempting to prevent the construction of Defendant, Kahle's, project.

18. The League to Save Lake Tahoe, on August 16, 1974, filed suit number 6566 in Douglas County, Nevada, entitled League to Save Lake Tahoe v. Douglas County, et al, in an attempt to stop Defendant, Kahle's, project. Plaintiffs had full knowledge of this suit.

19. On June 5, 1975, the State of California petitioned the Douglas county Court to file an Amicus Curiae brief to assist the League to Save Lake Tahoe, setting out in the brief the same grounds set out herein.

20. That the League to Save Lake Tahoe, on the 3rd day of May, 1976, filed a suit in the above-entitled Court under the Clean Air Act, action number R 76-85 BRT, entitled League To Save Lake Tahoe, et al, vs. Roger S. Trounday, et al, for the purpose of stopping Defendant, Kahle's, project. Plaintiffs had full knowledge of this suit.

21. That the Plaintiff has not, at any time, made a good faith effort to stop Defendant's project by injunction.

22. That all causes of action and all claims set out in the above-entitled matter were available, apparent, and known to Plaintiffs at the time of the filing of the first suit filed by the State of California, being case number Civil R 74-108 BRT, filed on August 7, 1974.

23. That all of the claims in the above-entitled action could and should have been included in the first action filed by the State of California.

24. That any objections that a building higher than 40 feet violated Section 7.13 of the Land Use Ordinance, or that Defendant, Kahle, should have applied for a variance under Section 8.33 of the Land Use Ordinance should have been made by Plaintiffs in the permit issuing procedures, and at the hearing before the Tahoe Regional Planning Agency.

25. After the decision of the Ninth Circuit Court of Appeals in State of California ex rel. Evelle Younger, Attorney General, vs. Tahoe Regional Planning Agency et al, case number R 74-108 BRT, the Plaintiffs made no attempt to amend their Complaint or to file another action setting out the claims included in this action.

26. That after final action by the governing body of the Tahoe Regional Planning Agency the Plaintiffs did not, pursuant to N.R.S. 278.027, ask for a review before any court of the action of the said governing body.

27. Plaintiffs, prior to this suit, never filed in any court a petition for review of the action of the Tahoe Regional Planning Agency when Defendant, Kahle's, permit was deemed approved by operation of law.

28. That there is another suit pending in the United States District Court for the Eastern District of California being number S-2989, entitled League to Save Lake Tahoe, et al, vs. Tahoe Regional Planning Agency, Thomas Raley, and Defendants herein, Park Cattle Company, and Harvey's Wagon Wheel, Inc., in which all

of the issues pending herein are, or should be, involved. The State of California had full knowledge of this suit.

29. Defendant, Kahle, twice started to construct his project but the foregoing litigation affected his financing and forced him to stop.

30. The delays in construction have increased the cost of Defendant, Kahle's, project in an amount in excess of Ten Million Dollars.

31. The language of Section 7.13 of the Land Use Ordinance of the Tahoe Regional Planning Agency is not ambiguous.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact the Court does hereby make its Conclusions of Law.

1. There was substantial evidence before the Douglas County Commissioners to support their findings that in connection with Defendant, Kahle's, project (1) provision has been made for protection from fire hazards and against aviation accident; (2) consideration has been given to the protection of view and to the character of the neighborhood; (3) proper provision has been made for light and air; and (4) such greater height will better promote the protection of the environment in the area.

2. There was substantial evidence before the Douglas County Commissioners to support their findings that Defendant, Kahle's, project would not be detrimental to health, safety, peace, morals, comfort and general welfare of persons residing or working in the neighborhood of such proposed use, or detrimental or injurious to

property and improvements in the neighborhood or to the general welfare of the Region, and will not cause any substantial harmful environmental consequences on the land of the applicant or on other lands or water.

3. There has been no violation of the Land Use Ordinance by Defendant, Kahle, or by Douglas County, and the height of Defendant, Kahle's, project does not violate the Bi-State Compact, or any of the rules, regulations or ordinances, (including the Land Use Ordinance) of the Tahoe Regional Planning Agency.

4. That the meaning and intent of Section 7.13 of the Land Use Ordinance is that projects can exceed 40 feet or 45 feet if the conditions set out in Sections 7.13 and 8.33 of the Land Use Ordinance are met.

5. That Defendant, Kahle's, Administrative Permit was approved by operation of law by the Tahoe Regional Planning Agency on August 12, 1974.

6. That the approval of an Administrative Permit by operation of law has the same legal effect as an approval by unanimous vote of the governing body of the Tahoe Regional Planning Agency.

7. There was compliance with all provisions of the Land Use Ordinance by Defendant, Kahle, and by Douglas County.

8. That a project with a height greater than 40 feet does not require a variance.

9. That all claims of Plaintiffs against Defendant, Kahle, are barred by laches as a matter of law.

10. That all claims of Plaintiffs against Defendant, Kahle, are barred by the principle of res adjudicata.

11. That all claims of Plaintiffs against Defendant, Kahle, are barred by the provisions of N.R.S. 278.027.

DATED this 31st day of October, 1977.

BRUCE R. THOMPSON
District Judge

BREEN, YOUNG, WHITEHEAD & HOY,
Chartered
232 Court Street
Reno, Nevada
(702) 786-7600

Of Counsel:

Charles D. Stein
Donald E. Egan
Lee Ann Watson
Katten, Muchin, Gitles,
Zavis, Pearl & Galler
55 East Monroe St., Suite 4100
Chicago, Illinois 60603
(312) 346-7400

Attorneys for Defendant,
Oliver Kahle

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY and PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs,

v.

TED JENNINGS; OLIVER KAHLE; HARVEY'S WAGON WHEEL, INC.; PARK CATTLE CO.; and COUNTY OF DOUGLAS,

Defendants.

Civ. R. 77-0158 BRT

JUDGMENT OF DISMISSAL

Pursuant to the Findings of Fact and Conclusions of Law filed herein, and good cause appearing therefor, it is hereby ORDERED, ADJUDGED AND DECREED,

The Motion by Plaintiffs for Preliminary Injunction is denied;

The Motion by Plaintiffs for Summary Judgment is denied;

The Motion of Defendant, Kahle, to dismiss the Complaint of Plaintiff is hereby granted, and Defendant, Kahle, is awarded his costs herein.

DATED this 31st day of October, 1977.

BRUCE R. THOMPSON
District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY; and PEOPLE OF THE STATE OF CALIFORNIA

Plaintiffs

vs.

TED JENNINGS; OLIVER KAHLE; HARVEY'S WAGON WHEEL, INC.; PARK CATTLE CO.; and COUNTY OF DOUGLAS

Defendants.

NO. CIV. R. 77-0158

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL JUDGMENT

THIS MATTER came before the Court on October 17, 18, and 19, 1977, pursuant to plaintiffs' Motion for Summary Judgment and Motion for Preliminary Injunction, and on various Motions of the defendants, including defendant Harveys' Motion to Dismiss, and the plaintiffs and all defendants having presented evidence, and the Court having considered the evidence presented by each party as being available to all parties, and the matter having been argued and briefed and submitted to the Court, and the Fourth Claim for Relief against de-

fendant Harvey's Wagon Wheel, Inc., having been dismissed by the Court pursuant to stipulation of counsel, the Court being fully advised in the premises, and based on the evidence submitted by plaintiffs and the undisputed evidence and facts submitted by defendants, the Court finds and concludes as follows:

FINDINGS OF FACT

1. That on or about June 20, 1973, the Douglas County Commissioners, the permit-issuing authority pursuant to the TRPA Land Use Ordinance, issued an administrative permit to defendant Harvey's Wagon Wheel, Inc., approving its Master Plan and allowing a new hotel tower with a height greater than 40 feet; that prior to issuing said administrative permit to said defendant, the Douglas County Commissioners required the presentation of extensive evidence in support of such additional height pursuant to § 7.13 and § 8.33 of the TRPA Land Use Ordinance.

2. That the Douglas County Commissioners, prior to the issuance of said administrative permit, fully complied with all provisions of all applicable ordinances and regulations including §§ 7.13 and 8.33 of the TRPA Land Use Ordinance.

3. That there was submitted to the Douglas County Commissioners, prior to the issuance of the above referenced administrative permit, substantial evidence pursuant to §§ 7.13 and 8.33, and upon such substantial evidence the Douglas County Commissioners determined and found, *inter alia,* that "such greater height

will better promote the protection of the environment in the area"; that the administrative record before Douglas County contained substantial evidence to support such finding and determination.

4. That said permit was subsequently submitted to and approved by the Nevada TRPA, and thereafter on July 20, 1973, was submitted to the TRPA for review; that on or about the 25th day of July, 1973, a hearing was held on the Harvey's administrative permit before the TRPA, at which time the governing body did not obtain a dual majority vote to approve, modify or reject the project, and that on or about September 20, 1973, the Harvey's administrative permit was deemed approved by operation of law, pursuant to the terms of the TRPA Compact and Land Use Ordinance.

5. That at the time of the adoption of the Land Use Ordinance there existed in the area where defendant Harvey's project is to be constructed several high-rise structures, including structures which were higher than those in the project proposed by defendant Harvey's; at that time, it was common knowledge that under the said Land Use Ordinance, and particularly § 7.13, there would be structures many times higher than 40 feet or 45 feet.

6. That the plaintiffs herein did not appear at the hearing before the Douglas County Commissioners when the Harvey's administrative permit was approved; nor at the NTRPA hearing; nor at the TRPA hearing. At no time in said hearings did the plaintiffs herein raise any issue or contention that the Harvey's project was in

violation of § 7.13 or § 8.33 of the Land Use Ordinance or otherwise was in violation of law.

7. That in processing defendant Harveys' application for administrative permit the provisions of the TRPA Land Use Ordinance were strictly and carefully followed and that the administrative permit is valid and was, when issued, valid and was valid on its face.

8. That after the administrative permit of defendant Harvey's became final on or about September 20, 1973, defendant Harvey's, in good faith, relied on that administrative permit and has expended the sum of approximately $2,795,348.88 in furtherance of its project; that plaintiffs, with full knowledge, allowed defendant Harvey's to proceed in reliance upon its administrative permit which was valid on its face.

9. That on July 22, 1975, defendant Harvey's was issued all necessary excavation, grading and building permits for the "first addition" of its Master Plan project. Pursuant to these permits, in a course of construction commencing September 10, 1975 and continuing until September 15, 1976, Harvey's constructed said addition, including administrative offices, employee lockers and cafeteria, warehouse and food lockers, all at a cost of approximately $2,795,348.88. Thereafter, pursuant to an excavation, grading and foundation permit issued February 4, 1977, Harvey's commenced construction of its parking garage under said Master Plan, accomplishing physical relocation of all utilities and having a construction company crew ready to commence excavation on September 1, 1977, when all activity was suspended vol-

untarily due to the pendency of this action.

10. On September 20, 1973, the League to Save Lake Tahoe and the Sierra Club brought an action against the TRPA, Harvey's Wagon Wheel, Inc., Park Cattle Company and Tom Raley in the United States District Court for the Eastern District of California. The League to Save Lake Tahoe and Sierra Club did not and have not at any time in said action effectively seek or follow through with injunctive relief against Harvey's in that action.

11. That plaintiff, State of California, on or about August 7, 1974, filed suit in federal District Court entitled State of California ex rel Evelle Younger, Attorney General, versus Tahoe Regional Planning Agency, et al, case number R-74-108 BRT, (hereinafter referred to as the "Younger case"), which action attacked the validity of the administrative permits issued to defendants Jennings and Kahle and alleged, *inter alia,* that said projects if constructed "will be in violation of the TRPA Ordinance on land use intensity and height limits".

12. That on or about August 16, 1974, plaintiff League to Save Lake Tahoe filed suit number 6566 in Douglas County, Nevada (hereinafter "Douglas County" case), which action attacked the administrative permit issued to defendant Harvey's and alleged, *inter alia,* said permit was issued in violation of §§ 7.13 and 8.33 of the TRPA Land Use Ordinance; was not supported by substantial evidence; and therefore was arbitrary, capricious and contrary to law.

13. That on or about June 5, 1975, plaintiff California

petitioned the Douglas County Court to file an *amicus curiae* brief in the Douglas County action.

14. That on or about May 3, 1976, the League to Save Lake Tahoe filed a suit in federal District Court under the Clean Air Act, case number R-76-86 BRT, entitled League to Save Lake Tahoe v. Roger S. Trounday, et al (hereinafter referred to as the "Trounday case"), which suit sought to enjoin defendant Jennings' project.

15. That the Younger action was appealed to the Ninth Circuit Court of Appeals and the appellate Court first issued its opinion on April 30, 1975, and amended the same on June 11, 1975.

16. That none of the plaintiffs at any time have effectively sought and followed through with injunctive relief against defendant Harvey's project.

17. That all actions and claims set forth in the within action were available, apparent, and known to plaintiffs at the time the Eastern District Action was commenced on September 20, 1973; and at the time of the filing of the Younger suit on August 7, 1974, and the within claims could and should have been included therein.

18. That all causes of action and all claims set forth in the within matter were available, apparent and known to plaintiffs at the time of filing the Douglas County case on August 16, 1974.

19. That the plaintiffs delayed an unreasonable period of time in commencing within action.

20. That any objections that a building higher than 40 feet violated § 7.13 of the Land Use Ordinance should have been made by plaintiffs in the permit-issuing

procedures and at the hearings before the Douglas County Commissioners, the Nevada Tahoe Regional Planning Agency, and the TRPA.

21. That after the decision of the Ninth Circuit Court of Appeals in the Younger case, plaintiffs made no attempt to amend their Complaint or file another action setting out the claims included in the within action.

22. That the Douglas County action was dismissed against the League to Save Lake Tahoe with prejudice, which dismissal was affirmed by the Nevada Supreme Court on May 3, 1977.

23. That additional delay in the construction of Harvey's project will result in substantial increase in the total cost of construction.

24. That the language of § 7.13 of the TRPA Land Use Ordinance is not ambiguous.

CONCLUSIONS OF LAW

1. The Court has subject matter jurisdiction pursuant to 28 U.S.C. 1331(a).

2. That defendant Harvey's administrative permit was approved by operation of law under the terms of the TRPA Compact on or about September 20, 1973, which approval has the same legal effect as an approval by the unanimous vote of the governing body of the TRPA.

3. That plaintiffs' claims against defendant Harvey's are barred by NRS 278.027.

4. That plaintiffs' claims against defendant Harvey's are barred by the doctrine of *laches* as a matter of law.

5. That plaintiffs' claims against defendant Harvey's

are barred by the doctrines of *res judicata* and collateral estoppel.

6. That in issuing the administrative permit to defendant Harvey's, Douglas County complied with all applicable local, state and TRPA ordinances, rules and regulations, and said permit was validly issued and is presently valid.

7. That defendant Harvey's has a vested right to complete construction of its project in accordance with the terms of its building and administrative permits.

8. That the Land Use Ordinance § 7.13 is not ambiguous and plainly contemplates applications for, and the granting of, heights substantially in excess of 40 feet if the conditions of § 7.13 and § 8.33 are met.

9. That Douglas County made adequate findings that defendant Harvey's project meets all the conditions of §§ 7.13 and 8.33 of the Land Use Ordinance, and said determinations and findings are supported by substantial evidence in the record.

10. That the plaintiffs' claims against the defendant Harvey's were not timely raised or asserted before the various administrative bodies that reviewed the Harvey's administrative permit, and that therefore the plaintiffs have failed to preserve said claims for judicial review and the within action is barred for the failure of plaintiffs to exhaust and timely assert available administrative remedies.

11. That the First and Second Causes of Action against defendant Harvey's fail to state a claim for which relief can be granted.

JUDGMENT OF DISMISSAL

Pursuant to the Findings of Fact and Conclusions of Law set forth above, and good cause appearing, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. That the Motion of plaintiffs for Preliminary Injunction be and the same hereby is denied.

2. That the Motion of plaintiffs for Summary Judgment be and the same hereby is denied.

3. That the Motion of defendant Harvey's to Dismiss the First and Second Claims for Relief be and the same hereby is granted.

4. That the First and Second Claims for Relief are dismissed with prejudice and judgment is entered in favor of defendant Harvey's together with costs.

DATED this 31st day of October, 1977.

BRUCE R. THOMPSON
U.S. District Judge

ORDER DISMISSING FIRST AND SECOND CLAIMS FOR RELIEF
(Pursuant to granting of County's Motion to Dismiss)

STEVEN D. McMORRIS
District Attorney
Douglas County, Nevada
Douglas County Courthouse
Minden, Nevada 89423
Telephone: (702) 782-5176

Attorney for Defendant
Douglas County

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY; and PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs,

vs.

TED JENNINGS; OLIVER KAHLE; HARVEY'S WAGON WHEEL, INC.; PARK CATTLE CO.; and COUNTY OF DOUGLAS,

Defendants.

No. Civ R 77-0158 BRT

This Court having heretofore made its Order granting defendant County's Motion to Dismiss the First and Second Claims of plaintiffs' Complaint,

NOW, THEREFORE, it is ORDERED and ADJUDGED that plaintiffs' First and Second Claims for Relief be, and they hereby are, dismissed.

DATED: October 31, 1977

BRUCE R. THOMPSON
Judge of the United States District Court for the District of Nevada

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY; and PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs,

v.

TED JENNINGS; OLIVER KAHLE; HARVEY'S WAGON WHEEL, INC.; PARK CATTLE CO.; and COUNTY OF DOUGLAS,

Defendants.

NO. CIV. R. 77-0158 BRT

ORDER

This case came on to be heard on the motions of defendants Ted Jennings, Oliver Kahle, Harvey's Wagon Wheel, Inc., and County of Douglas to dismiss the complaint, before the above entitled Court at the hour of 9:30 a.m. on October 17, 1977.

The Court having considered the briefs and memoranda on file in the action, the oral arguments of counsel for plaintiffs and defendants, and being fully advised and having issued its opinion orally in the proceedings commencing at 9:00 a.m. on October 20, 1977;

And the Fourth Claim for Relief against defendant

Harvey's Wagon Wheel, Inc. having been dismissed pursuant to stipulation of counsel, it is hereby

ORDERED pursuant to said opinion of the Court, that the action be dismissed against said defendants on the merits and on the further grounds of laches and the limitations bar of N.R.S. 278.027, and the Court having determined that there is no just reason for delay in entering final judgment on the First and Second Claims for Relief against said defendants, it is further, pursuant to Rule 54 b of the Federal Rules of Civil Procedure,

ORDERED, that final judgment be entered on the First and Second Claims for Relief, in favor of defendants Ted Jennings, Oliver Kahle, Harvey's Wagon Wheel, Inc., and County of Douglas.

DATED: October 31, 1977.

BRUCE R. THOMPSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY; and PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs,

v.

TED JENNINGS; OLIVER KAHLE; HARVEY'S WAGON WHEEL, INC.; PARK CATTLE CO.; and COUNTY OF DOUGLAS,

Defendants.

NO. CIV. R 77-0158 BRT

ORDER

Plaintiffs motions for preliminary injunction and summary judgment against defendants Ted Jennings, Oliver Kahle, Harvey's Wagon Wheel, Inc., Park Cattle Co. and County of Douglas, and Park Cattle Co.'s motion for summary judgment against plaintiffs came on to be heard before the above entitled Court at the hour of 9:30 a.m. on October 18, 1977.

There was no oral testimony. Documentary evidence was received in evidence as plaintiffs Exhibits 1-22, and defendants Exhibits 23-52. The Court having considered the briefs and memoranda on file in the action, the exhibits in evidence, the oral arguments of counsel for plaintiffs and defendants, and being fully advised, and having issued its opinion orally in the proceedings commencing at 9:00 a.m. on October 20, 1977, which opinion constitutes the findings of fact and conclusions of law, it is hereby

ORDERED pursuant to said opinion of the Court that:

1. Plaintiffs motion for preliminary injunction against each of said defendants is denied.

2. Plaintiffs motion for summary judgment against each of said defendants is denied.

3. Plaintiffs' motion for an injunction pending appeal against each of said defendants is denied.

4. Defendant Park Cattle Co.'s motion for summary judgment on plaintiffs' Third Claim for Relief is denied; and it is further

ORDERED pursuant to said opinion of the Court that defendant Park Cattle Co.'s motion for summary judgment is granted dismissing the First and Second Claims for Relief against said defendant on the merits and on

the further grounds of laches, and the limitations bar of N.R.S. 278.027, and the Court having determined that there is no just reason for delay in entering final judgment on the First and Second Claims for Relief against said defendant, it is further, pursuant to Rule 54 b of the Federal Rules of Civil Procedure,

ORDERED that final judgment be entered on the First and Second Claims for Relief, in favor of defendant Park Cattle Co.

DATED: October ____, 1977.

_____

United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY; et al.,

Plaintiffs,

vs.

TED JENNINGS; et al.,

Defendants.

Civil No. R-77-0158 BRT

STATEMENT

Plaintiffs have filed a "Motion for Relief from Mistakes in the Record."

For the information of plaintiffs' counsel, I never sign anything without reading it and the documents signed on October 31, 1977, were signed wilfully and deliberately. Thus the Court's interpretation of the meaning and intent of the oral decision must differ from counsels'. Local Rule 19A is directory and not mandatory and is not binding on the Court. Amendments to findings may be sought by motion under Rule 52(b) F.R.C.P.

So that there will be no question about compliance with F.R.C.P. 58, the Court has signed all the forms of judgment submitted with plaintiffs' motion after making a minor change of a "clerical or substantial error."

DATED: December 8, 1977.

BRUCE R. THOMPSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY; and PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs,

vs.

TED JENNINGS; OLIVER KAHLE; HARVEY'S WAGON WHEEL, INC.; PARK CATTLE CO.; and COUNTY OF DOUGLAS,

Defendants.

No. Civ. R. 77-0158 BRT

JUDGMENT

This action came on for hearing before the Court, Honorable Bruce R. Thompson, United States District Judge, Presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that defendant Ted Jennings' motion to dismiss this case is granted.

Judgment is hereby entered in favor of defendant Ted Jennings and against plaintiffs in the above-entitled case.

Dated at Reno, Nevada, this thirty-first day of October, 1977.

BRUCE R. THOMPSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY; and PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs,

v.

TED JENNINGS; OLIVER KAHLE; HARVEY'S WAGON WHEEL, INC.; PARK CATTLE CO.; and COUNTY OF DOUGLAS,

Defendants.

No. Civ. R. 77-0158 BRT

JUDGMENT

This action came on for hearing before the Court, Honorable Bruce R. Thompson, United States District Judge, Presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that defendant Harvey's Wagon Wheel, Inc.'s motion to dismiss this case is granted.

Judgment is hereby entered in favor of defendant Harvey's Wagon Wheel, Inc., and against plaintiffs in the above-entitled case.

Dated at Reno, Nevada, this thirty-first day of October, 1977.

BRUCE R. THOMPSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY; and PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs,

v.

TED JENNINGS; OLIVER KAHLE; HARVEY'S WAGON WHEEL, INC.; PARK CATTLE CO.; and COUNTY OF DOUGLAS,

Defendants.

No. Civ. R. 77-0158 BRT

JUDGMENT

This action came on for hearing before the Court, Honorable Bruce R. Thompson, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that defendant County of Douglas' motion to dismiss this case is granted.

Judgment is hereby entered in favor of defendant County of Douglas and against plaintiffs in the above-entitled case.

Dated at Reno, Nevada, this thirty-first day of October, 1977.

BRUCE R. THOMPSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY; and PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs,

v.

TED JENNINGS; OLIVER KAHLE; HARVEY'S WAGON WHEEL, INC.; PARK CATTLE CO.; and COUNTY OF DOUGLAS,

Defendants.

No. Civ. R. 77-0158 BRT

JUDGMENT

This action came on for hearing before the Court, Honorable Bruce R. Thompson, United States District Judge, Presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that defendant Oliver Kahle's motion to dismiss this case is granted.

Judgment is hereby entered in favor of defendant Oliver Kahle and against plaintiffs in the above-entitled case.

Dated at Reno, Nevada, this thirty-first day of October, 1977.

BRUCE R. THOMPSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

LEAGUE TO SAVE LAKE TAHOE; SIERRA CLUB,

Plaintiffs

vs.

TED JENNINGS; OLIVER KAHLE; HARVEY'S WAGON WHEEL, INC.; PARK CATTLE CO.; and COUNTY OF DOUGLAS,

Defendants.

No. CIV. R. 77-0158

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL JUDGMENT

THIS MATTER came before the Court on October 17, 18, and 19, 1977, pursuant to plaintiffs' Motion for Summary Judgment and Motion for Preliminary Injunction, and on various Motions of the Defendants, including defendant Harveys' Motion to Dismiss, and the plaintiffs and all defendants having presented evidence, and the Court having considered the evidence presented by each party as being available to all parties and the matter having been argued and briefed and submitted to the Court, and the Third Claim for Relief of plaintiffs League and Sierra Club against defendant Harvey's Wagon Wheel, Inc., having been dismissed by the Court

pursuant to stipulation of counsel, the Court being fully advised in the premises, and based on the evidence submitted by plaintiffs and the undisputed evidence and facts submitted by defendants, the Court finds and concludes as follows:

FINDINGS OF FACT

1. That on or about June 20, 1973, the Douglas County Commissioners, the permit-issuing authority pursuant to the TRPA Land Use Ordinance, issued an administrative permit to defendant Harvey's Wagon Wheel, Inc., approving its Master Plan and allowing a new hotel tower with a height greater than 40 feet; that prior to issuing said administrative permit to said defendant, the Douglas County Commissioners required the presentation of extensive evidence in support of such additional height pursuant to § 7.13 and § 8.33 of the TRPA Land Use Ordinance.

2. That the Douglas County Commissioners, prior to the issuance of said administrative permit, fully complied with all provisions of all applicable ordinances and regulations including §§ 7.13 and 8.33 of the TRPA Land Use Ordinance.

3. That there was submitted to the Douglas County Commissioners, prior to the issuance of the above referenced administrative permit, substantial evidence pursuant to §§ 7.13 and 8.33, and upon such substantial evidence the Douglas County Commissioners determined and found, *inter alia,* that "such greater height will better promote the protection of the environment

in the area"; that the administrative record before Douglas County contained substantial evidence to support such finding and determination.

4. That said permit was subsequently submitted to and approved by the Nevada TRPA, and thereafter on July 20, 1973, was submitted to the TRPA for review; that on or about the 25th day of July, 1973, a hearing was held on the Harvey's administrative permit before the TRPA, at which time the governing body did not obtain a dual majority vote to approve, modify or reject the project, and that on or about September 20, 1973, the Harvey's administrative permit was deemed approved by operation of law, pursuant to the terms of the TRPA Compact and Land Use Ordinance.

5. That at the time of the adoption of the Land Use Ordinance there existed in the area where defendant Harvey's project is to be constructed several high-rise structures, including structures which were higher than those in the project proposed by defendant Harvey's at that time, it was common knowledge that under the said Land Use Ordinance, and particularly § 7.13, there would be structures many times higher than 40 feet or 45 feet.

6. That the plaintiffs herein did not appear at the hearing before the Douglas County Commissioners when the Harvey's administrative permit was approved; not at the NTRPA hearing; nor at the TRPA hearing. At no time in said hearings did the plaintiffs herein raise any issue or contention that the Harvey's project was in violation of § 7.13 or § 8.33 of the Land Use Ordinance or

otherwise was in violation of law.

7. That in processing defendant Harvey's application for administrative permit the provisions of the TRPA Land Use Ordinance were strictly and carefully followed and that the administrative permit is valid and was, when issued, valid and was valid on its face.

8. That after the administrative permit of defendant Harvey's became final on or about September 20, 1973, defendant Harvey's, in good faith, relied on that administrative permit and has expended the sum of approximately $2,795,348.88 in furtherance of its project; that plaintiffs, with full knowledge, allowed defendant Harvey's to proceed in reliance upon its administrative permit which was valid on its face.

9. That on July 22, 1975, defendant Harvey's was issued all necessary excavation, grading and building permits for the "first addition" of its Master Plan project. Pursuant to these permits, in a course of construction commencing September 10, 1975, and continuing until September 15, 1976, Harvey's constructed said addition, including administrative offices, employee lockers and cafeteria, warehouse and food lockers, all at a cost of approximately $2,795,348.88. Thereafter, pursuant to an excavation, grading and foundation permit issued February 4, 1977, Harvey's commenced construction of its parking garage under said Master Plan, accomplishing physical relocation of all utilities and having a construction company crew ready to commence excavation on September 1, 1977, when all activity was suspended voluntarily due to the pendency of this action.

10. On September 20, 1973, the League to Save Lake Tahoe and the Sierra Club brought an action against the TRPA, Harvey's Wagon Wheel, Inc., Park Cattle Company and Tom Raley in the United States District Court for the Eastern District of California. The League to Save Lake Tahoe and Sierra Club did not and have not at any time in said action effectively seek or follow through with injunctive relief against Harvey's in that action.

11. That plaintiff, State of California, on or about August 7, 1974, filed suit in federal District Court entitled State of California ex rel Evelle Younger, Attorney General, versus Tahoe Regional Planning Agency, et al, case number R-74-108 BRT, (hereinafter referred to as the "Younger case"), which action attacked the validity of the administrative permits issued to defendants Jennings and Kahle and alleged, *inter alia,* that said projects if constructed "will be in violation of the TRPA Ordinance on land use intensity and height limits".

12. That on or about August 16, 1974, plaintiff League to Save Lake Tahoe filed suit number 6566 in Douglas County, Nevada (hereinafter "Douglas County" case), which action attacked the administrative permit issued to defendant Harvey's and alleged, *inter alia,* said permit was issued in violation of §§ 7.13 and 8.33 of the TRPA Land Use Ordinance; was not supported by substantial evidence; and therefore was arbitrary, capricious and contrary to law.

13. That on or about June 5, 1975, plaintiff California petitioned the Douglas County Court to file an *amicus*

curiae brief in the Douglas County action.

14. That on or about May 3, 1976, the League to Save Lake Tahoe filed a suit in federal District Court under the Clean Air Act, case number R-76-86 BRT, entitled League to Save Lake Tahoe v. Roger S. Trounday, et al (hereinafter referred to as the "Trounday case"), which suit sought to enjoin defendant Jennings' project.

15. That the Younger action was appealed to the Ninth Circuit Court of Appeals and the appellate Court first issued its opinion on April 30, 1975, and amended the same on June 11, 1975.

16. That none of the plaintiffs at any time have effectively sought and followed through with injunctive relief against defendant Harvey's project.

17. That all actions and claims set forth in the within action were available, apparent, and known to plaintiffs at the time the Eastern District Action was commenced on September 20, 1973; and at the time of the filing of the Younger suit on August 7, 1974, and the within claims could and should have been included therein.

18. That all causes of action and all claims set forth in the within matter were available, apparent and known to plaintiffs at the time of filing the Douglas County case on August 16, 1974.

19. That the plaintiffs delayed an unreasonable period of time in commencing the within action.

20. That any objections that a building higher than 40 feet violated § 7.13 of the Land Use Ordinance should have been made by plaintiffs in the permit-issuing procedures and at the hearings before the Douglas

County Commissioners, the Nevada Tahoe Regional Planning Agency, and the TRPA.

21. That after the decision of the Ninth Circuit Court of Appeals in the Younger case, plaintiff California made no attempt to amend its Complaint or file another action setting out the claims included in the within action.

22. That the Douglas County action was dismissed against the League to Save Lake Tahoe with prejudice, which dismissal was affirmed by the Nevada Supreme Court on May 3, 1977.

23. That additional delay in the construction of Harvey's project will result in substantial increase in the total cost of construction.

24. That the language of § 7.13 of the TRPA Land Use Ordinance is not ambiguous.

CONCLUSIONS OF LAW

1. The Court has subject matter jurisdiction pursuant to 28 U.S.C. 1331(a).

2. That defendant Harvey's administrative permit was approved by operation of law under the terms of the TRPA Compact on or about September 20, 1973, which approval has the same legal effect as an approval by the unanimous vote of the governing body of the TRPA.

3. That plaintiffs' claims against defendant Harvey's are barred by NRS 278.027.

4. That plaintiffs' claims against defendant Harvey's are barred by the doctrine of laches as a matter of law.

5. That plaintiffs' claims against defendant Harvey's are barred by the doctrines of *res judicata* and collateral

estoppel.

6. That in issuing the administrative permit to defendant Harvey's, Douglas County complied with all applicable local, state and TRPA ordinances, rules and regulations, and said permit was validly issued and is presently valid.

7. That defendant Harvey's has a vested right to complete construction of its project in accordance with the terms of its building and administrative permits.

8. That the Land Use Ordinance § 7.13 is not ambiguous and plainly contemplates applications for, and the granting of, heights substantially in excess of 40 feet if the conditions of § 7.13 and § 8.33 are met.

9. That Douglas County made adequate findings that defendant Harvey's project meets all the conditions of §§ 7.13 and 8.33 of the Land Use Ordinance, and said determinations and findings are supported by substantial evidence in the record.

10. That the plaintiffs' claims against the defendant Harvey's were not timely raised or asserted before the various administrative bodies that review the Harvey's administrative permit, and that therefore the plaintiffs have failed to preserve said claims for judicial review and the within action is barred for the failure of plaintiffs to exhaust and timely assert available administrative remedies.

11. That the First Cause of Action against defendant Harvey's fails to state a claim for which relief can be granted.

JUDGMENT OF DISMISSAL

Pursuant to the Findings of Fact and Conclusions of Law set forth above, and good cause appearing, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. That the Motion of plaintiffs for Preliminary Injunction be and the same hereby is denied.

2. That the Motion of plaintiffs for Summary Judgment be and the same hereby is denied.

3. That the Motion of defendant Harvey's to Dismiss the First Claim for Relief be and the same hereby is granted.

4. That the First Claim for Relief is dismissed with prejudice and judgment is entered in favor of defendant Harvey's, together with costs.

DATED this 31st day of October, 1977.

BRUCE R. THOMPSON
U. S. District Judge

BREEN, YOUNG, WHITEHEAD & HOY,
Chartered
232 Court Street
Reno, Nevada 89501
(702) 786-7600

Of Counsel:

Charles D. Stein
Donald E. Egan
Lee Ann Watson
Katten, Muchin, Gitles,
Zavis, Pearl & Galler
55 East Monroe St., Suite 4100
Chicago, Illinois 60603
(312) 346-7400

Attorneys for Defendant,
Oliver Kahle

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

LEAGUE TO SAVE LAKE TAHOE;
SIERRA CLUB,

Plaintiffs,

vs.

TED JENNINGS; OLIVER KAHLE;
HARVEY'S WAGON WHEEL, INC.;
PARK CATTLE CO.; DEL WEBB
INTERNATIONAL, INC.; COUNTY OF
DOUGLAS,

Defendants.

No. 77-0159 BRT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The plaintiffs in the above entitled matter have heretofore filed a motion for Summary Judgment and have also requested a Preliminary Injunction against Defendant, Oliver Kahle, hereinafter referred to as "Kahle."

Defendant, Kahle, has heretofore filed herein his Motion to Dismiss Plaintiff's Complaint.

The hearing on all of the said motions did come on before the above-entitled Court on the 17th, 18th, and 19th days of October, 1977.

All parties were represented by counsel, and voluminous evidence was adduced on behalf of all parties; the matter was extensively briefed and argued; and the Court being fully informed does hereby make its Findings of Fact, Conclusions of Law, and enters its Judgment of Dismissal.

FINDINGS OF FACT

1. That the Douglas County Commissioners, the Permit Issuing Authority, prior to issuing to Defendant, Kahle, the Administrative Permit, pursuant to Section 8.33 of the Land Use Ordinance of the Tahoe Regional Planning Agency, required the presentation of extensive evidence for Defendant, Kahle's, project pursuant to Land Use Ordinance Section 7.13, providing for greater height, and Section 8.33, the Section authorizing the issuance of Administrative Permits.

2. That there was submitted to the Douglas County Commissioners, prior to the issuance of the said Administrative Permit, substantial evidence pursuant to

Section 7.13. That the evidence so submitted to the Douglas County Commissioners showed that (1) provision has been made for protection from fire hazards and against aviation accidents; (2) consideration has been given to the protection of view and to the character of the neighborhood; (3) proper provision has been made for light and air; and (4) such greater height will better promote the protection of the environment in the area.

3. That the Douglas County Commissioners, prior to the issuance of the said Administrative Permit, made a serious and determined effort to comply with the provisions of Sections 7.13 and 8.33 of the Land Use Ordinance of the Tahoe Regional Planning Agency.

4. That the height of Defendant, Kahle's, project is between 70 feet and 100 feet.

5. That the Douglas County Commissioners made written findings that (1) provision has been made for protection from fire hazards and against aviation accidents; (2) consideration has been given to the protection of view and to the character of the neighborhood; (3) proper provision has been made for light and air; and (4) such greater height will better promote the protection of the environment in the area.

Said findings were both in the language of Section 7.13, and in language not in the specific language of Section 7.13.

6. That there was submitted to the Douglas County Commissioners, prior to the issuance of the said Administrative Permit, substantial evidence pursuant to Section 8.33; that the evidence so submitted to the Doug-

las County Commissioners showed that the establishment, maintenance or operation of Defendant, Kahle's, project is not detrimental to the health, safety, peace, morals, comfort and general welfare of persons residing or working in the neighborhood of such proposed use, or detrimental or injurious to property and improvements in the neighborhood or to the general welfare of the Region, and will not cause any substantial harmful environmental consequences on the land of the applicant or on other lands or waters.

7. That the Douglas County Commissioners made written findings that the establishment, maintenance or operation of Defendant, Kahle's project, is not detrimental to the health, safety, peace, morals, comfort and general welfare of persons residing or working in the neighborhood of such proposed use, or detrimental or injurious to property and improvements in the neighborhood or to the general welfare of the Region, and will not cause any substantial harmful enrivonmental consequences on the land of the applicant or on other lands or waters.

8. That the Douglas County Commissioners, prior to the issuance of said Administrative Permit, did fully comply with Sections 7.13 and 8.33 of the Land Use Ordinance.

9. That at the time of the adoption of the Land Use Ordinance there existed in the area where Defendant, Kahle's, project is to be constructed several existing highrise structures considerably higher than Defendant, Kahle's, project.

10. That the members of the Tahoe Regional Planning Agency at the time of the adoption of the Land Use Ordinance, February, 1972, contemplated that there would be numerous applications requesting a height much greater than 40 feet or 45 feet.

11. That at the time of the adoption of the said Land Use Ordinance it was common knowledge that under the said Land Use Ordinance, and particularly Section 7.13, there would be structures many times higher than 40 feet or 45 feet.

12. That at none of the hearings on Defendant, Kahle's permit, including the hearing before the Tahoe Regional Planning Agency, was any contention made that a project higher than 40 feet violated Section 7.13, the height Section of the Land Use Ordinance, or that a variance should have been applied for under Section 8.34 of the Land Use Ordinance.

13. That in the processing of Defendant, Kahle's application for an Administrative Permit the provisions of the Land Use Ordinance were strictly and carefully followed.

14. That the Administrative Permit of Defendant, Kahle, is valid and was, when issued, valid, and was valid on its face.

15. That in reliance upon the Administrative Permit Defendant, Kahle, has expended substantial funds and incurred substantial costs.

16. The Plaintiffs, with full knowledge of Defendant, Kahle's, action, permitted Defendant, Kahle, to proceed and to rely upon the Administrative Permit which was

valid on its face.

17. On July 17, 1974, Plaintiff, League to Save Lake Tahoe, petitioned to file an amicus curiae brief in an action filed in Washoe County, Nevada on June 25, 1974, and moved to Douglas County, Nevada, entitled Roger Trounday, as Director of the Department of Human Resources, v. Oliver Kahle, et al, action number 6509, and the State of California had full knowledge of said action.

18. The People of the State of California ex rel. Evelle Younger, Attorney General, filed action number R 74-108 BRT, in the Federal District Court for the District of Nevada on August 7, 1974, and the Plaintiff, League To Save Lake Tahoe, had full knowledge of such action.

19. On August 16, 1974, the Plaintiff, League To Save Lake Tahoe, filed suit number 6566, entitled League To Save Lake Tahoe v. Douglas County, et al, and in June, 1975, the California Tahoe Regional Planning Agency petitioned the Court to file an amicus curiae brief in said suit.

20. On May 3, 1976, Plaintiff, League To Save Lake Tahoe, filed a suit under the Clean Air Act, in the United States District Court for the District of Nevada, number R 76-85 BRT, entitled League To Save Lake Tahoe, et al, vs. Roger S. Trounday, et al, to stop Defendant, Kahle's, project, and the State of California and the California Tahoe Regional Planning Agency were informed of that suit.

21. The League To Save Lake Tahoe has filed suit in the United States District Court, Eastern District of California, number S-2989, on September 20, 1973, entitled League to Save Lake Tahoe, et al, vs. Tahoe Regional Planning Agency, et al, and the State of California was informed of that action.

22. That the Plaintiffs have not, at any time, made a good faith effort to stop said projects by injunction.

23. That all causes of action and all claims set out in the above-entitled matter were available, apparent, and known to Plaintiffs at the time of the filing of the first suit filed by the Plaintiff, League to Save Lake Tahoe, on August 16, 1974, being Douglas County, Nevada suit number 6566.

24. That all of the claims in the above-entitled action could and should have been included in the first action filed by the Plaintiff, League to Save Lake Tahoe.

25. That any objections that a building higher than 40 feet violated Section 7.13 of the Land Use Ordinance, or that Defendant, Kahle, should have applied for a variance under Section 8.33 of the Land Use Ordinance should have been made by Plaintiffs in the permit issuing procedures, and at the hearing before the Tahoe Regional Planning Agency.

26. After the decision of the Ninth Circuit Court of Appeals in People of the State of California ex rel. Evelle Younger, Attorney General, vs. Tahoe Regional Planning Agency, et al, which decision the Plaintiffs were informed of, the Plaintiffs made no attempt to file an action setting out the claims included in this action.

27. After final action by the governing body of the Tahoe Regional Planning Agency the Plaintiffs did not,

pursuant to N.R.S. 278.027, ask for a review before any court of the action of the said governing body.

28. Plaintiffs, prior to this suit, never filed in any court a petition for review of the action of the Tahoe Regional Planning Agency when Defendant, Kahle's, permit was deemed approved by operation of law.

29. Defendant, Kahle, twice started to construct his project but the foregoing litigation affected his financing and forced him to stop.

30. The delays in construction have increased the cost of Defendant, Kahle's, project in an amount in excess of Ten Million Dollars.

31. The language of Section 7.13 of the Land Use Ordinance of the Tahoe Regional Planning Agency is not ambiguous.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact the Court does hereby make its Conclusions of Law.

1. There was substantial evidence before the Douglas County Commissioners to support their findings that in connection with Defendant, Kahle's, project (1) provision has been made for protection from fire hazards and against aviation accident; (2) consideration has been given to the protection of view and to the character of the neighborhood; (3) proper provision has been made for light and air; and (4) such greater height will better promote the protection of the environment in the area.

2. There was substantial evidence before the Douglas County Commissioners to support their findings that

Defendant, Kahle's, project would not be detrimental to health, safety, peace, morals, comfort and general welfare of persons residing or working in the neighborhood of such proposed use, or detrimental or injurious to property and improvements in the neighborhood or to the general welfare of the Region, and will not cause any substantial harmful environmental consequences on the land of the applicant or on other lands or water.

3. There has been no violation of the Land Use Ordinance by Defendant, Kahle, or by Douglas County, and the height of Defendant, Kahle's, project does not violate the Bi-State Compact, or any of the rules, regulations or ordinances, (including the Land Use Ordinance) of the Tahoe Regional Planning Agency.

4. That the meaning and intent of Section 7.13 of the Land Use Ordinance is that projects can exceed 40 feet or 45 feet if the conditions set out in Sections 7.13 and 8.33 of the Land Use Ordinance are met.

5. That Defendant, Kahle's, Administrative Permit was approved by operation of law by the Tahoe Regional Planning Agency on August 12, 1974.

6. That the approval of an Administrative Permit by operation of law has the same legal effect as an approval by unanimous vote of the governing body of the Tahoe Regional Planning Agency.

7. There was compliance with all provisions of the Land Use Ordinance by Defendant, Kahle, and by Douglas County.

8. That a project with a height greater than 40 feet does not require a variance.

9. That all claims of Plaintiffs against Defendant, Kahle, are barred by laches as a matter of law.

10. That all claims of Plaintiffs against Defendant, Kahle, are barred by the principle of res adjudicata.

11. That all claims of Plaintiffs against Defendant, Kahle, are barred by the provisions of N.R.S. 278.027.

DATED this 31st day of October, 1977.

BRUCE R. THOMPSON
District Judge

BREEN, YOUNG, WHITEHEAD & HOY,
Chartered
232 Court Street
Reno, Nevada 89501
(702) 786-7600

Of Counsel:

Charles D. Stein
Donald E. Egan
Lee Ann Watson
Katten, Muchin, Gitles,
Zavis, Pearl & Galler
55 East Monroe St., Suite 4100
Chicago, Illinois 60603
(312) 346-7400

Attorneys for Defendant,
Oliver Kahle

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

LEAGUE TO SAVE LAKE TAHOE; SIERRA CLUB,

Plaintiffs,

v.

TED JENNINGS; OLIVER KAHLE; HARVEY'S WAGON WHEEL, INC.; PARK CATTLE CO.; DEL WEBB INTERNATIONAL, INC.; COUNTY OF DOUGLAS,

Defendants.

No. 77-0159 BRT

JUDGMENT OF DISMISSAL

Pursuant to the Findings of Fact and Conclusions of Law filed herein, and good cause appearing therefor, it is hereby ORDERED, ADJUDGED AND DECREED,

The Motion by Plaintiffs for Preliminary Injunction is denied;

The Motion by Plaintiffs for Summary Judgment is denied;

The Motion of Defendant, Kahle, to dismiss the Complaint of Plaintiff is hereby granted, and Defendant, Kahle, is awarded his costs herein.

DATED this 31st Day of October, 1977.

BRUCE R. THOMPSON
District Judge

ORDER DISMISSING FIRST CLAIM FOR RELIEF (pursuant to granting County's Motion to Dismiss)

STEVEN D. McMORRIS
District Attorney
Douglas County, Nevada
Douglas County Courthouse
Minden, Nevada 89423
Telephone: (702) 782-5176

Attorneys for Defendant
Douglas County

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

LEAGUE TO SAVE LAKE TAHOE; SIERRA CLUB,

Plaintiffs,

vs.

TED JENNINGS; OLIVER KAHLE; HARVEY'S WAGON WHEEL, INC.; PARK CATTLE CO.; DEL WEBB INTERNATIONAL, INC.; COUNTY OF DOUGLAS,

Defendants.

Civ R 77-0139

This Court having heretofore made its Order granting defendant County's Motion to Dismiss the First Claim of plaintiffs' Complaint,

NOW, THEREFORE, it is ORDERED and ADJUDGED that plaintiffs' First Claim for Relief be, and it hereby is, dismissed.

DATED: October 31, 1977.

BRUCE R. THOMPSON
Judge of the United States District Court for the District of Nevada

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

LEAGUE TO SAVE LAKE TAHOE, SIERRA CLUB,

Plaintiffs,

v.

TED JENNINGS, OLIVER KAHLE, HARVEY'S WAGON WHEEL, INC., PARK CATTLE COMPANY, DEL WEBB INTERNATIONAL, INC. COUNTY OF DOUGLAS,

Defendants.

NO. R-77-0159-BRT
ORDER

The motions of defendants Ted Jennings, Oliver Kahle, Harvey's Wagon Wheel, Inc., Del Webb International, Inc. and County of Douglas to dismiss the complaint, came on to be heard before the above entitled Court at the hour of 9:30 a.m. on October 17, 1977.

Plaintiffs motions for preliminary injunction and summary judgment against defendants Ted Jennings, Oliver Kahle, Harvey's Wagon Wheel, Inc., Park Cattle Co. and County of Douglas, and Park Cattle Co.'s motion for summary judgment against plaintiffs came on to be heard before the above entitled Court at the hour of 9:30

a.m. on October 18, 1977.

Plaintiffs and defendants motions in this action were consolidated for purposes of hearing and evidence with plaintiffs' and defendants' motions in Action No. CIV. R 77-0158-BRT.

There was no oral testimony. Documentary evident was received in evidence as plaintiffs Exhibits 1-22, and defendants Exhibits 23-52. The Court having considered the briefs and memoranda on file in the action, the exhibits in evidence, the oral arguments of counsel for plaintiffs and defendants, and being fully advised, and having issued its opinion orally in the proceedings commencing at 9:00 a m. on October 20, 1977, which opinion constitutes the findings of fact and conclusions of law, and the Third Claim for Relief against defendant, Del Webb International, Inc., and Harvey's Wagon Wheel, Inc., having been dismissed pursuant to stipulation of counsel, and the action against Del Webb International, Inc., having been thereby dismissed, it is hereby

ORDERED pursuant to said opinion of the Court that:

1. The action be dismissed as to the First Claim for Relief against the defendants Ted Jennings, Oliver Kahle, Harvey's Wagon Wheel, Inc., and County of Douglas, on the merits and on the further grounds of laches and the limitations bar of N.R.S. 278.027.

2. Plaintiffs motion for preliminary injunction against each of said defendants is denied.

3. Plaintiffs motion for summary judgment against each of said defendants is denied.

4. Defendant Park Cattle Co.'s motion for summary

judgment as to the First Claim for Relief against said defendant is granted on the merits and on the further grounds of laches and the limitations bar of N.R.S. 278.027.

5. Defendant Park Cattle Co.'s motion for summary judgment on plaintiffs' Second Claim for Relief is denied;

6. Plaintiffs' motion for an injunction pending appeal against each of said defendants is denied.

It is further found that there is no just reason for delay in entering final judgment on the First Claim for Relief pursuant to Rule 54(b) of the Federal Rules of Civil Procedure and it is hereby

ORDERED that final judgment be entered on the First Claim for Relief, in favor of defendants Ted Jennings, Oliver Kahle, Harvey's Wagon Wheel, Inc., Park Cattle Company and County of Douglas.

DATED: October 31st, 1977.

BRUCE R. THOMPSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

LEAGUE TO SAVE LAKE TAHOE; SIERRA CLUB

Plaintiffs,

vs.

TED JENNINGS; OLIVER KAHLE; HARVEY'S WAGON WHEEL, INC.; PARK CATTLE CO.; DEL WEBB INTERNATIONAL, INC.; COUNTY OF DOUGLAS

Defendants.

No. 77-0159 BRT

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL JUDGMENT

THIS MATTER came before the Court on October 17, 18, and 19, 1977, pursuant to plaintiffs' Motion for Summary Judgment and Motion for Preliminary Injunction, and on various Motions of the defendants, including defendant Jennings' Motion to Dismiss, and the plaintiffs and all defendants having presented evidence and the Court having considered the evidence presented by each party as being available to all parties, and the matter having been argued and briefed and submitted to the Court, and the Court being fully advised in the premises and to the extent that the Court considered matters outside the pleadings, defendant Jennings' Mo-

tion to Dismiss was treated as one for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and based on the evidence submitted by plaintiffs and the undisputed evidence and facts submitted by defendants, the Court finds and concludes as follows:

FINDINGS OF FACT

1. That on or about May 7, 1973, the Douglas County Commissioners, the permit-issuing authority pursuant to the TRPA Land Use Ordinance, issued an administrative permit to defendant Jennings approving his project and allowing a height greater than 40 feet; that prior to issuing said administrative permit to defendant Jennings, the Douglas County Commissioners required the presentation of extensive evidence in support of such additional height pursuant to § 7.13 and § 8.33 of the TRPA Land Use Ordinance.

2. That the Douglas County Commissioners, prior to the issuance of said administrative permit, fully complied with all provisions of all applicable ordinances and regulations including §§ 7.13 and 8.33 of the TRPA Land Use Ordinance.

3. That there was submitted to the Douglas County Commissioners, prior to the issuance of the above referenced administrative permit, substantial evidence pursuant to §§ 7.13 and 8.33, and upon such substantial evidence the Douglas County Commissioners made written findings which provided, *inter alia,* that "such greater height will better promote the protection of the

environment in the area"; that the administrative record before Douglas County contained substantial evidence to support such findings.

4. That said permit was subsequently submitted to and approved by the Nevada TRPA, and thereafter was submitted to the TRPA for review; that on or about the 24th day of July, 1974, a hearing was held on the Jennings administrative permit before the TRPA at which time the governing body did not obtain a dual majority vote to approve, modify or reject the Jennings project, and that on or about August 12, 1974, the Jennings administrative permit was deemed approved by operation of law pursuant to the terms of the TRPA Compact and Land Use Ordinance.

5. That at the time of the adoption of the Land Use Ordinance there existed in the area where defendant Jennings' project is to be constructed several high-rise structures, including structures which were higher than the project proposed by defendant Jennings; at that time it was common knowledge that under the said Land Use Ordinance, and particularly § 7.13, there would be structures many times higher than 40 feet or 45 feet.

6. That the plaintiffs herein did not appear at the hearing before the Douglas County Commissioners when the Jennings administrative permit was issued. Plaintiff League to Save Lake Tahoe made an appearance before the NTRPA and the TRPA at the time of the hearing on defendant Jennings' permit. However, at no time did any of the plaintiffs herein raise any issue or

contention that the Jennings project was in violation of § 7.13 or 8.33 of the Land Use Ordinance.

7. That in processing defendant Jennings' application for administrative permit the provisions of the TRPA Land Use Ordinance were strictly and carefully followed and that the administrative permit is valid and was, when issued, valid, and was valid on its face.

8. That after the administrative permit of defendant Jennings became final on or about August 12, 1974, defendant Jennings in good faith, relied on that administrative permit and has expended the sum of approximately $7,000,000 in furtherance of his project; that plaintiffs, with full knowledge, allowed defendant Jennings to proceed in reliance upon his administrative permit which was valid on its face.

9. That on September 2, 1975, defendant Jennings was issued a building permit for grading and excavation on his project. On October 14, 1975, Jennings received a building permit for foundations for his project. Pursuant to these permits the grading and excavation on the project was substantially completed, and the foundations and footings were constructed; and that the costs of construction in reliance on said permits was approximately $2,000,000.

10. That plaintiff, State of California, on or about August 7, 1974, filed suit in federal District Court entitled State of California ex rel Evelle Younger, Attorney General, versus Tahoe Regional Planning Agency, et al, case number R-74-108 BRT, (hereinafter referred to as the "Younger case"), which action attacked the validity of

the administrative permit issued to defendant Jennings and alleged, *inter alia*, that defendant Jennings' project if constructed "will be in violation of the TRPA Ordinance on land use intensity and height limits".

11. That on or about August 16, 1974, plaintiff League to Save Lake Tahoe filed suit number 6566 in Douglas County, Nevada, (hereinafter "Douglas County" case), which action attacked the administrative permit issued to defendant Jennings and alleged, *inter alia*, said permit was issued in violation of §§ 7.13 and 8.33 of the TRPA Land Use Ordinance, was not supported by substantial evidence and therefore was arbitrary, capricious and contrary to law.

12. That on or about June 5, 1975, California petitioned the Douglas County Court to file an *amicus curiae* brief in the Douglas County action.

13. That on or about May 3, 1976, plaintiff League to Save Lake Tahoe filed a suit in federal District Court under the Clean Air Act, case number R-76-85 BRT, entitled League to Save Lake Tahoe v. Roger S. Trounday, et al (hereinafter referred to as the "Trounday case"), which suit sought to enjoin defendant Jennings' project.

14. That the Younger action was appealed to the Ninth Circuit Court of Appeals and the appellate Court first issued its opinion on April 30, 1975, and amended the same on June 11, 1975.

15. That none of the plaintiffs at any time have effectively sought and followed through with injunctive relief against defendant Jennings' project.

16. That all actions and claims set forth in the within action were available, apparent, and known to plaintiffs at the time of the filing of the Younger suit in August of 1974, and the within claims could and should have been included therein.

17. That all causes of action and all claims set forth in the within matter were available, apparent and known to plaintiffs at the time of filing the Douglas County case on August 16, 1974.

18. That the plaintiffs delayed an unreasonable period of time in commencing the within action.

19. That any objections that a building higher than 40 feet violated § 7.13 of the Land Use Ordinance should have been made by plaintiffs in the permit-issuing procedures and at the hearings before the Douglas County Commissioners, the Nevada Tahoe Regional Planning Agency, and the TRPA.

20. That after the decision of the Ninth Circuit Court of Appeals in the Younger case, plaintiffs made no attempt to amend their Complaint or file another action setting out the claims included in the within action.

21. That the Douglas County action was dismissed against the League to Save Lake Tahoe with prejudice, which dismissal was affirmed by the Nevada Supreme Court on May 3, 1977.

22. That additional delay in the construction of Jennings' project will result in substantial increase in the total cost of construction.

23. That the language of § 7.13 of the TRPA Land Use Ordinance is not ambiguous.

CONCLUSIONS OF LAW

1. The Court has subject matter jurisdiction pursuant to 28 U.S.C. 1331(a).

2. That defendant Jennings' administrative permit was approved by operational law by the TRPA on or about August 12, 1974, which approval has the same legal effect as an approval by the unanimous vote of the governing body of the TRPA.

3. That plaintiffs' claims against defendant Jennings are barred by NRS 278.027.

4. That plaintiffs' claims against defendant Jennings are barred by the doctrine of *laches* as a matter of law.

5. That plaintiffs' claims against defendant Jennings are barred by the doctrine of *res judicata.*

6. That in issuing the administrative permit to defendant Jennings, Douglas County complied with all applicable local, state and TRPA ordinances, rules and regulations, and said permit was validly issued and is presently valid.

7. That defendant Jennings has a vested right to complete construction of his project in accordance with the terms of his building and administrative permits.

8. That the Land Use Ordinance § 7.13 is not ambiguous and plainly contemplates applications for, and the granting of, heights substantially in excess of 40 feet if the conditions of § 7.13 and § 8.33 are met.

9. That Douglas County made adequate findings that defendant Jennings' project meets all the conditions of §§ 7.13 and 8.33 of the Land Use Ordinance, and said determinations and findings are supported by substantial evidence in the record.

10. That even if there were any deficiencies in the proceeding before Douglas County, those deficiencies were resolved and corrected before the TRPA and by the approval of Jennings' administrative permit by operation of law.

11. That the plaintiffs' claims against defendant Jennings were not timely raised or asserted before the various administrative bodies that reviewed the Jennings administrative permit, and that therefore the plaintiffs have failed to preserve said claims for judicial review and the within action is barred for the failure of plaintiffs to exhaust and timely assert available administrative remedies.

12. That the First and Second Causes of Action against defendant Jennings fail to state a claim for which relief can be granted.

JUDGMENT OF DISMISSAL

Pursuant to the Findings of Fact and Conclusions of Law set forth above, and good cause appearing, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. That the Motion of plaintiffs for Preliminary Injunction be and the same hereby is denied.

2. That the Motion of plaintiffs for Summary Judgment be and the same hereby is denied.

3. That the Motion of defendant Jennings to Dismiss the First and Second Claims for Relief be and the same hereby is granted.

4. That the First and Second Claims for Relief are dismissed with prejudice and judgment is entered in favor of defendant Jennings together with costs.

DATED this 31st day of October, 1977.

BRUCE R. THOMPSON
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

LEAGUE TO SAVE LAKE TAHOE, SIERRA CLUB,

Plaintiffs,

vs.

TED JENNINGS, et al.,

Defendants.

Civil No. R-77-0159 BRT

ORDER

It has just been called to this Court's attention that on November 10, 1977, plaintiffs filed a "Motion for Relief From Mistakes in the Record." The Court has fully considered the motion and the responses thereto.

Good cause appearing,

IT HEREBY IS ORDERED:

1. The Findings of Fact, Conclusions of Law and Final Judgment signed and filed on October 31, 1977 with respect to defendant Ted Jennings are hereby amended as follows: the words "and Second" on page 7 line 24, and on page 8 line 6, and on page 8 line 8, are hereby stricken.

. . . .

2. In all other respects said motion is hereby denied.

DATED January 13, 1978.

BRUCE R. THOMPSON
United States District Judge

APPENDIX D

Public Law 91-148 [83 Stat. 360]

AN ACT

To grant the consent of the Congress to the Tahoe regional planning compact, to authorize the Secretary of the Interior and others to cooperate with the planning agency thereby created, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to encourage the wise use and conservation of the waters of Lake Tahoe and of the resources of the area around said lake, the consent of the Congress is hereby given to the Tahoe regional planning compact heretofore adopted by the States of California and Nevada, which compact reads as follows:

"TAHOE REGIONAL PLANNING COMPACT

"ARTICLE I. FINDINGS AND DECLARATIONS OF POLICY

"(a) It is found and declared that the waters of Lake Tahoe and other resources of the Lake Tahoe region are threatened with deterioration or degeneration, which may endanger the natural beauty and economic productivity of the region.

"(b) It is further declared that by virtue of the special conditions and circumstances of the natural ecology, developmental pattern, population distribution, and human needs in the Lake Tahoe region, the region is experiencing problems of resource use and deficiencies

of environmental control.

"(c) It is further found and declared that there is a need to maintain an equilibrium between the region's natural endowment and its manmade environment, to preserve the scenic beauty and recreational opportunities of the region, and it is recognized that for the purpose of enhancing the efficiency and governmental effectiveness of the region, it is imperative that there be established an areawide planning agency with power to adopt and enforce a regional plan of resource conservation and orderly development, to exercise effective environmental controls and to perform other essential functions, as enumerated in this title.

"ARTICLE II. DEFINITIONS

"As used in this compact:

"(a) 'Region,' includes Lake Tahoe, the adjacent parts of the Counties of Douglas, Ormsby, and Washoe lying within the Tahoe Basin in the State of Nevada, and the adjacent parts of the Counties of Placer and El Dorado lying within the Tahoe Basin in the State of California, and that additional and adjacent part of the County of Placer outside of the Tahoe Basin in the State of California which lies southward and eastward of a line starting at the intersection of the basin crestline and the north boundary of Section 1, thence west to the northwest corner of Section 3, thence south to the intersection of the basin crestline and the west boundary of Section 10; all sections referring to Township 15 North, Range 16 East, M.D.B.&M. The region defined and described

herein shall be as precisely delineated on official maps of the agency.

"(b) 'Agency' means the Tahoe Regional Planning Agency.

"(c) 'Governing body' means the governing board of the Tahoe Regional Planning Agency.

"(d) 'Regional plan' shall mean the long-term general plan for the development of the region.

"(e) 'Interim plan' shall mean the interim regional plan adopted pending the adoption of the regional plan.

"(f) 'Planning commission' means the advisory planning commission appointed pursuant to paragraph (h) of Article III.

"ARTICLE III. ORGANIZATION

"(a) There is created the Tahoe Regional Planning Agency as a separate legal entity.

"The governing body of the agency shall be constituted as follows:

"One member appointed by each of the County Boards of Supervisors of the Counties of El Dorado and Placer and one member appointed by the City Council of the City of South Lake Tahoe. Each member shall be a member of the city council or county board of supervisors which he represents and, in the case of a supervisor, shall be a resident of a county supervisorial district lying wholly or partly within the region.

"One member appointed by each of the boards of county commissioners of Douglas, Ormsby and Washoe counties. Any member so appointed shall be a resident

of the county from which he is appointed and may be, but is not required to be:

"(1) A member of the board which appoints him; and

"(2) a resident of or the owner of real property in the region, as each board of county commissioners may in its own discretion determine. The manner of selecting the person so to be appointed may be further prescribed by county ordinance. A person so appointed shall before taking his seat on the governing body disclose all his economic interests in the region, and shall thereafter disclose any further economic interest which he acquires, as soon as feasible after he acquires it. If any board of county commissioners fails to make an appointment required by this paragraph within 30 days after the effective date of this act or the occurrence of a vacancy on the governing body, the governor shall make such appointment. The position of a member appointed by a board of county commissioners shall be deemed vacant if such member is absent from three consecutive meetings of the governing body in any calendar year.

"One member appointed by the Governor of California and one member appointed by the Governor of Nevada. The appointment of the California member is subject to Senate confirmation; he shall not be a resident of the region and shall represent the public at large. The member appointed by the Governor of Nevada shall not be a resident of the region and shall represent the public at large.

"The Administrator of the California Resources Agency or his designee and the Director of the Nevada

Department of Conservation and Natural Resources or his designee.

"(b) The members of the agency shall serve without compensation, but the expenses of each member shall be met by the body which he represents in accordance with the law of that body. All other expenses incurred by the governing body in the course of exercising the powers conferred upon it by this compact unless met in some other manner specifically provided, shall be paid by the agency out of its own funds.

"(c) The term of office of the members of the governing body shall be at the pleasure of the appointing authority in each case, but each appointment shall be reviewed no less often than every 4 years.

"(d) The governing body of the agency shall meet at least monthly. All meetings shall be open to the public to the extent required by the law of the State of California or the State of Nevada, whichever imposes the greater requirement, applicable to local governments at the time such meeting is held. The governing body shall fix a date for its regular monthly meeting in such terms as 'the first Monday of each month,' and shall not change such date oftener than once in any calendar year. Notice of the date so fixed shall be given by publication at least once in a newspaper or combination of newspapers whose circulation is general throughout the region and in each county a portion of whose territory lies within the region. Notice of any special meeting, except an emergency meeting, shall be given by so publishing the date, place and agenda at least 5 days prior to the meet-

ing.

"(e) The position of a member of the governing body shall be considered vacated upon his loss of any of the qualifications required for his appointment and in such event the appointing authority shall appoint a successor.

"(f) The governing body shall elect from its own members a chairman and vice chairman, whose terms of office shall be two years, and who may be reelected. If a vacancy occurs in either office, the governing body may fill such vacancy for the unexpired term.

"(g) A majority of the members of the governing body from each state shall constitute a quorum for the transaction of the business of the agency. A majority vote of the members present representing each state shall be required to take action with respect to any matter. The vote of each member of the governing body shall be individually recorded. The governing body shall adopt its own rules, regulations and procedures.

"(h) An advisory planning commission shall be appointed by the agency, which shall consist of an equal number of members from each state. The commission shall include but shall not be limited to: the chief planning officers of Placer County, El Dorado County, and the City of South Lake Tahoe in California and the Counties of Douglas, Ormsby, and Washoe in Nevada, the Placer County Director of Sanitation, the El Dorado County Director of Sanitation, the county health officer of Douglas County or his designee, the county health officer of Washoe County or his designee, the Chief of the Bureau of Environment Health of the Health Division of Department of Health, Welfare and Rehabilitation of the State of Nevada or his designee, the executive officer of the Lahontan Regional Water Quality Control Board or his designee, the executive officer of the Tahoe Regional Planning Agency who shall act as chairman and at least four lay members each of whom shall be a resident of the region.

"(i) The agency shall establish and maintain an office within the region. The agency may rent or own property and equipment. Every plan, ordinance and other record of the agency which is of such nature as to constitute a public record under the law of either the State of California or the State of Nevada shall be open to inspection and copying during regular office hours.

"(j) Each authority charged under this compact or by the law of either state with the duty of appointing a member of the governing body of the agency shall by certified copy of its resolution or other action notify the Secretary of State of its own state of the action taken. Upon receipt of certified copies of the resolutions or notifications appointing the members of the governing body, the Secretary of State of each respective state shall notify the Governor of the state who shall, after consultation with the Governor of the other state, issue a concurrent call for the organization meeting of the governing body at a location determined jointly by the two governors.

"(k) Each state may provide by law for the disclosure or elimination of conflicts of interest on the part of members of the governing body appointed from that state.

"ARTICLE IV. PERSONNEL

"(a) The governing body shall determine the qualification of, and it shall appoint and fix the salary of, the executive officer of the agency, and shall employ such other staff and legal counsel as may be necessary to execute the powers and functions provided for under this act or in accordance with any intergovernmental contracts or agreements the agency may be responsible for administering.

"(b) Agency personnel standards and regulations shall conform insofar as possible to the regulations and procedures of the civil service of the State of California or the State of Nevada, as may be determined by the governing body of the agency, and shall be regional and bistate in application and effect; provided that the governing body may, for administrative convenience and at its discretion, assign the administration of designated personnel arrangements to an agency of either state, and provided that administratively convenient adjustments be made in the standards and regulations governing personnel assigned under intergovernmental agreements.

"(c) The agency may establish and maintain or participate in such additional programs of employee benefits as may be appropriate to afford employees of the agency terms and conditions of employment similar to those enjoyed by employees of California and Nevada generally.

"ARTICLE V. PLANNING

"(a) In preparing each of the plans required by this article and each amendment thereto, if any, subsequent to its adoption, the planning commission after due notice shall hold at least one public hearing which may be continued from time to time, and shall review the testimony and any written recommendations presented at such hearing before recommending the plan or amendment. The notice required by this paragraph shall be given at least 20 days prior to the public hearing by publication at least once in a newspaper or combination of newspapers whose circulation is general throughout the region and in each county a portion of whose territory lies within the region.

"The planning commission shall then recommend such plan or amendment to the governing body for adoption by ordinance. The governing body may adopt, modify or reject the proposed plan or amendment, or may initiate and adopt a plan or amendment without referring it to the planning commission. If the governing body initiates or substantially modifies a plan or amendment, it shall hold at least one public hearing thereon after due notice as required in this paragraph.

"If a request is made for the amendment of the regional plan by:

"(1) a political subdivision a part of whose territory would be affected by such amendment; or

"(2) the owner or lessee of real property which would be affected by such amendment.

the governing body shall complete its action on such

amendment within 60 days after such request is delivered to the agency.

"TAHOE REGIONAL PLAN

"(b) Within 15 months after the formation of the agency, the planning commission shall recommend a regional plan. Within 18 months after the formation of the agency, the governing body shall adopt a regional plan. After adoption, the planning commission and governing body shall continuously review and maintain the regional plan. The regional plan shall consist of a diagram, or diagrams, and text, or texts setting forth the projects and proposals for implementation of the regional plan, a description of the needs and goals of the region and a statement of the policies, standards, and elements of the regional plan.

"The regional plan shall include the following correlated elements:

"(1) A land-use plan for the integrated arrangements and general location and extent of, and the criteria and standards for, the uses of land, water, air, space and other natural resources within the region, including but not limited to, an indication or allocation of maximum population densities.

"(2) A transportation plan for the integrated development of a regional system of transportation, including but not limited to, freeways, parkways, highways, transportation facilities, transit routes, waterways, navigation and aviation aids and facilities, and appurtenant terminals and facilities for the movement of people and goods

within the region.

"(3) A conservation plan for the preservation, development, utilization, and management of the scenic and other natural resources within the basin, including but not limited to, soils, shoreline and submerged lands, scenic corridors along transportation routes, open spaces, recreational and historical facilities.

"(4) A recreation plan for the development, utilization, and management of the recreational resources of the region, including but not limited to, wilderness and forested lands, parks and parkways, riding and hiking trails, beaches and playgrounds, marinas and other recreational facilities.

"(5) A public services and facilities plan for the general location, scale and provision of public services and facilities, which, by the nature of their function, size, extent and other characteristics are necessary or appropriate for inclusion in the regional plan.

"In formulating and maintaining the regional plan, the planning commission and governing body shall take account of and shall seek to harmonize the needs of the region as a whole, the plans of the counties and cities within the region, the plans and planning activities of the state, federal and other public agencies and nongovernmental agencies and organizations which affect or are concerned with planning and development within the region. Where necessary for the realization of the regional plan, the agency may engage in collaborative planning with local governmental jurisdictions located outside the region, but contiguous to its boundaries. In

formulating and implementing the regional plan, the agency shall seek the cooperation and consider the recommendations of counties and cities and other agencies of local government, of state and federal agencies, of educational institutions and research organizations, whether public or private, and of civic groups and private individuals.

"(c) All provisions of the Tahoe regional general plan shall be enforced by the agency and by the states, counties and cities in the region.

"TAHOE REGIONAL INTERIM PLAN

"(d) Within 60 days after the formation of the agency, the planning commission shall recommend a regional interim plan. Within 90 days after the formation of the agency, the governing body shall adopt a regional interim plan. The interim plan shall consist of statements of development policies, criteria and standards for planning and development, of plans or portions of plans, and projects and planning decisions, which the agency finds it necessary to adopt and administer on an interim basis in accordance with the substantive powers granted to it in this agreement.

"(e) The agency shall maintain the data, maps and other information developed in the course of formulating and administering the regional plan and interim plan, in a form suitable to assure a consistent view of developmental trends and other relevant information for the availability of and use by other agencies of government and by private organizations and individuals

concerned.

"(f) All provisions of the interim plan shall be enforced by the agency and by the states, the counties, and cities.

"ARTICLE VI. AGENCY'S POWERS

"(a) The governing body shall adopt all necessary ordinances, rules, regulations and policies to effectuate the adopted regional and interim plans. Every such ordinance, rule or regulation shall establish a minimum standard applicable throughout the basin, and any political subdivision may adopt and enforce an equal or higher standard applicable to the same subject of regulation in its territory. The regulations shall contain general, regional standards including but not limited to the following: water purity and clarity; subdivisions; zoning; tree removal; solid waste disposal; sewage disposal; land fills, excavations, cuts and grading; piers; harbors, breakwaters; or channels and other shoreline developments; waste disposal in shoreline areas; waste disposal from boats; mobile-home parks; house relocation; outdoor advertising; flood plain protection; soil and sedimentation control; air pollution; and watershed protection. Whenever possible without diminishing effectiveness of the interim plan or the general plan, the ordinances, rules, regulations and policies shall be confined to matters which are general and regional in application, leaving to the jurisdiction of the respective states, counties and cities the enactment of specific and local ordinances, rules, regulations and policies which conform to the in-

terim or general plan.

"Every ordinance adopted by the agency shall be published at least once by title in a newspaper or combination of newspapers whose circulation is general throughout the region. Except an ordinance adopting or amending the interim plan or the regional plan, no ordinance shall become effective until 60 days after its adoption. Immediately after its adoption, a copy of each ordinance shall be transmitted to the governing body of each political subdivision having territory within the region.

"Interim regulations shall be adopted within 90 days from the formation of the agency and final regulations within 18 months after the formation of the agency.

"Every plan, ordinance, rule, regulation or policy adopted by the agency shall recognize as a permitted and conforming use any business or recreational establishment which is required by law of the state in which it is located to be individually licensed by the state, if such business or establishment:

"(1) Was so licensed on February 5, 1968, or was licensed for a limited season during any part of the calendar year immediately preceding February 5, 1968.

"(2) Is to be constructed on land which was so zoned or designated in a finally adopted master plan on February 5, 1968, as to permit the construction of such a business or establishment.

"(b) All ordinances, rules, regulations and policies adopted by the agency shall be enforced by the agency and by the respective states, counties, and cities. The

appropriate courts of the respective states, each within its limits of territory and subject matter provided by state law, are vested with jursidiction over civil actions to which the agency is a party and criminal actions for violations of its ordinances. Each such action shall be brought in a court of the state where the violation is committed or where the property affected by a civil action is situated, unless the action is brought in a federal court. For this purpose, the agency shall be deemed a political subdivision of both the State of California and the State of Nevada.

"(c) Except as otherwise provided in paragraph (d), all public works projects shall be reviewed prior to construction and approved by the agency as to the project's compliance with the adopted regional general plan.

"(d) All plans, programs and proposals of the State of California or Nevada, or of its executive or administrative agencies, which may substantially affect, or may specifically apply, to the uses of land, water, air, space and other natural resources in the region, including but not limited to public works plans, programs and proposals concerning highway routing, design and construction, shall be referred to the agency for its review, as to conformity with the regional plan or interim plan, and for report and recommendations by the agency to the executive head of the state agency concerned and to the Governor. A public works project which is initiated and is to be constructed by a department of either state shall be submitted to the agency for review and recommendation, but may be constructed as proposed.

"(e) The agency shall police the region to ensure compliance with the general plan and adopted ordinances, rules, regulations and policies. If it is found that the general plan, or ordinances, rules, regulations and policies are not being enforced by a local jurisdiction, the agency may bring action in a court of competent jurisdiction to ensure compliance.

"(f) Violation of any ordinance of the agency is a misdemeanor.

"(g) The agency is hereby empowered to initiate, negotiate and participate in contracts and agreements among the local governmental authorities of the region, or any other intergovernmental contracts or agreements authorized by state or federal law.

"(h) Each intergovernmental contract or agreement shall provide for its own funding and staffing, but this shall not preclude financial contributions from the local authorities concerned or from supplementary sources.

"(i) Whenever a new city is formed within the region, the membership of the governing body shall be increased by two additional members, one appointed by, and who shall be a member of, the legislative body of the new city, and one appointed by the Governor of the state in which the city is not located. A member appointed by the Governor of California is subject to Senate confirmation.

"(j) Every record of the agency, whether public or not, shall be open for examination to the Legislative Analyst of the State of California and the Fiscal Analyst of the State of Nevada.

"(k) Whenever under the provisions of this article or any ordinance, rule, regulation or policy adopted pursuant thereto, the agency is required to review or approve any proposal, public or private, the agency shall take final action, whether to approve, to require modification or to reject such proposal, within 60 days after such proposal is delivered to the agency. If the agency does not take final action within 60 days, the proposal shall be deemed approved.

"ARTICLE VII. FINANCES

"(a) Except as provided in paragraph (e), on or before December 30 of each calendar year the agency shall establish the amount of money necessary to support its activities for the next succeeding fiscal year commencing July 1 of the following year. The agency shall apportion not more than $150,000 of this amount among the counties within the region on the same ratio to the total sum required as the full cash valuation of taxable property within the region in each county bears to the total full cash valuation of taxable property within the region. Each county in California shall pay the sum allotted to it by the agency from any funds available therefor and may levy a tax on any taxable property within its boundaries sufficient to pay the amount so allocated to it. Each county in Nevada shall pay such sums from its general fund or from any other moneys available therefor.

"(b) The agency may fix and collect reasonable fees for any services rendered by it.

"(c) The agency shall be strictly accountable to any county in the region for all funds paid by it to the agency and shall be strictly accountable to all participating bodies for all receipts and disbursements.

"(d) The agency is authorized to receive gifts, donations, subventions, grants, and other financial aids and funds.

"(e) As soon as possible after the ratification of this compact, the agency shall estimate the amount of money necessary to support its activities:

"(1) For the remainder of the then-current fiscal year; and

"(2) If the first estimate is made between January 1 and June 30, for the fiscal year beginning on July 1 of that calendar year.

The agency shall then allot such amount among the several counties, subject to the restriction and in the manner provided in paragraph (a), and each county shall pay such amount.

"(f) The agency shall not obligate itself beyond the moneys due under this article for its support from the several counties for the current fiscal year, plus any moneys on hand or irrevocably pledged to its support from other sources. No obligation contracted by the agency shall bind either of the party states or any political subdivision thereof.

"ARTICLE VIII. MISCELLANEOUS

"(a) It is intended that the provisions of this compact shall be reasonably and liberally construed to effectuate the purposes thereof. Except as provided in paragraph

(c), the provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any participating state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any state participating therein, the compact shall remain in full force and effect as to the remaining state and in full force and effect as to the state affected as to all severable matters.

"(b) The agency shall have such additional powers and duties as may hereafter be delegated or imposed upon it from time to time by the action of the Legislature of either state concurred in by the Legislature of the other.

"(c) A state party to this compact may withdraw therefrom by enacting a statute repealing the compact. Notice of withdrawal shall be communicated officially and in writing to the Governor of the other state and to the agency administrators. This provision is not severable, and if it is held to be unconstitutional or invalid, no other provision of this compact shall be binding upon the State of Nevada or the State of California.

"(d) No provision of this compact shall have any effect upon the allocation or distribution of interstate waters or upon any appropriative water right."

SEC. 2. The Secretary of the Interior and the Secre-

tary of Agriculture are authorized upon request of the Tahoe Regional Planning Agency, to cooperate with said agency in all respects compatible with carrying out the normal duties of their Departments.

SEC. 3. The consent to the compact by the United States is subject to the condition that the President may appoint a nonvoting representative of the United States to the Tahoe regional planning governing board.

SEC. 4. Any additional powers conferred on the agency pursuant to article VIII(b) of the compact shall not be exercised unless consented to by the Congress.

SEC. 5. Nothing contained in this Act or in the compact consented to shall in any way affect the powers, rights, or obligations of the United States, or the applicability of any law or regulation of the United States in, over, or to the region or waters which are the subject of the compact, or in any way affect rights owned or held by or for Indians or Indian tribes subject to the jurisdiction of the United States.

SEC. 6. The right is hereby reserved by the Congress or any of its standing committees to require the disclosure and furnishing of such information and data by or concerning the Tahoe Regional Planning Agency as is deemed appropriate by the Congress or such committee.

SEC. 7. The right to alter, amend or repeal this Act is expressly reserved.

Approved December 18, 1969.

APPENDIX E

Land Use Ordinance

Tahoe Regional Planning Agency

Adopted February 10, 1972——Effective April 11, 1972

TAHOE REGIONAL PLANNING AGENCY

LAND USE ORDINANCE

ORDINANCE NO. 4

AN ORDINANCE ESTABLISHING REGIONAL LAND USE DISTRICTS AND REGIONAL LAND CAPABILITY DISTRICTS; PROVIDING POPULATION DENSITY CONTROLS AND LAND COVERAGE LIMITATIONS; PROVIDING FOR THE ISSUANCE OF PERMITS CONCERNING LAND USES, STRUCTURES AND LAND COVERAGE; PROVIDING FOR NON-CONFORMING ALTERATIONS, USES AND STRUCTURES; PROVIDING FOR VARIANCES; AND PROVIDING FOR OTHER MATTERS PROPERLY RELATING THERETO, AS AMENDED BY:

Ordinance No. 8, adopted December 20, 1972, amending Section 9.13;

Ordinance No. 13, adopted May 24, 1973, amending Sections 1.00, 3.00, 5.10, 7.22, 7.82, 8.13, 8.25, 8.27, 8.28, 9.11, 9.12, 9.13, 9.14, 9.21, 9.22, 9.24, 9.30 and 9.31, and adding Section 11;

Ordinance No. 17, adopted March 28, 1974, amending Section 7.42(1)(a);

Ordinance No. 19, adopted October 23, 1974, amending Section 5.10, 5.20, 7.10, 7.13, 8.32 and 9.23, and adding Sections 7.120, 7.121, 7.122 and 7.123.

TAHOE REGIONAL PLANNING AGENCY

ORDINANCE NO. 4

AN ORDINANCE ESTABLISHING REGIONAL LAND USE DISTRICTS AND REGIONAL LAND CAPABILITY DISTRICTS; PROVIDING POPULATION DENSITY CONTROL AND LAND COVERAGE LIMITATIONS; PROVIDING FOR THE ISSUANCE OF PERMITS CONCERNING LAND USES, STRUCTURES AND LAND COVERAGE; PROVIDING FOR NON-CONFORMING ALTERATIONS, USES AND STRUCTURES; PROVIDING FOR VARIANCES; AND PROVIDING FOR OTHER MATTERS PROPERLY RELATING THERETO.

The Governing Body of the Tahoe Regional Planning Agency does ordain as follows:

Section 1.00 Findings

The Governing Body of the Tahoe Regional Planning Agency finds that in order to effectuate the adopted regional plan, it is necessary to adopt this ordinance establishing regional land use and land capability districts; providing population density controls and land coverage limitations; providing for the issuance of permits concerning land uses, structures, and land coverage; providing for non-conforming alterations, uses and structures; providing that violations of the ordinance shall constitute a misdemeanor; providing for variances; and providing for other matters properly relating thereto. The Governing Body further finds that the provisions of this ordinance are in accordance with the provisions and purposes of the Tahoe Regional Planning Compact.

Section 2.00 General Provisions

2.10 *Compliance*

Land use, land coverage, and population density standards shall be in compliance with the terms of this ordinance, and permits respecting same shall be granted or denied in conformity with the provisions of this ordinance.

2.11

The provisions of this ordinance establish the minimum standards applicable within the Region to the subject matters of the ordinance. Any political subdivision may enforce equal or higher standards within its territory and this ordinance shall not be deemed a limitation or repeal of any other powers granted to the governments of the Tahoe Region by the United States or the respective states.

2.20 *Interpretation and Severability*

The provisions of this Ordinance shall be liberally construed to effectuate their purposes. If any section, clause, provision or portion of this ordinance is adjudged unconstitutional or invalid by a court of competent jurisdiction, the remainder of this ordinance shall not be affected thereby.

2.30 *Short Title*

This ordinance may be cited and referred to as the Land Use Ordinance.

Section 3.00 Definitions

For the purpose of this Ordinance, cer-

tain terms or words used herein shall be interpreted as follows: Words in the present tense include the future; words in the singular number include the plural number, and words in the plural number include the singular number. The word "shall" is mandatory, not permissive, unless the context indicates that a directory meaning is intended.

Accessory Uses—A use, building or other facility customarily a part of any permitted use that is clearly incidental and secondary to the permitted use and which does not change the character of the permitted use, or affect other properties in the vicinity.

Administrative Permit—A permit issued by a permit-issuing authority in accordance with its procedures to enable special consideration of whether a use, activity, building, structure, height, land coverage or other aspect of use or development will be permitted under the provisions of this Ordinance.

Agency—The Tahoe Regional Planning Agency.

Building—Any structure built and maintained for the support, shelter, or enclosure of persons, animals, or property of any kind.

Bulk Storage—Activities and uses with associated structures devoted to the storage of products and substances in bulk quantities such as lumber, oil, gasoline, building materials, and vehicles, and warehouses for consumer and other products.

Child Care Nurseries—Buildings and other structures, and land, designed to be used for the care of four or more children, with or without compensation.

Collective Household—A group of at least two, but not more than six, persons who are unrelated by blood, marriage or adoption, living together as an independent housekeeping unit.

Commercial, General—The retail or wholesale sale or rental of any article, substance or commodity, including building materials and vehicles and the provision of all commercial services including financial institutions and personal commercial services.

Commercial, Limited—The retail sale or the rental of any consumer article, substance or commodity, but not including service stations and establishments for the sale of building materials other than hardware, automotive vehicles, and other items of significant size and prominence that are normally displayed or stored outside of a building. Also, the provisions of personal commercial services such as barber shops, beauty shops, photography studios, dry cleaners, and laundries.

Cultural Facilities—Uses, and facilities such as libraries, museums, art galleries, auditoriums, zoological gardens, historic sites and monuments.

Day Use Areas—Land or premises, other than Outdoor Amusement Facilities, designed to be used by members of the public, for a fee or otherwise, for outdoor recreation purposes on a daily basis. Such areas include such uses and facilities as parks, playgrounds, picnic sites, tennis courts, beaches, marinas, athletic fields, and golf courses.

Developed Campgrounds—Land or premises designed to be used, let or rented for temporary occupancy by campers traveling by automobile or otherwise and which contain such facilities as tent sites, bathrooms or other sanitary facilities, piped water installations, and parking areas, but not including mobile home parks. Developed campgrounds may include facilities for the temporary placement of camp trailers and camping vehicles which are utilized for non-permanent residential uses at no more than six such vehicles per acre.

Educational Facilities, Avocational—Buildings and other structures, and land, designed to be used for providing training in hobbies and recreational activities including dance, athletics, boating and the like.

Educational Facilities, General Education—Buildings and other structures, and land, designed to be used for providing general education, including elementary schools, secondary schools, colleges and universities, as licensed by the respective states.

Educational Facilities, Vocational—Buildings and other structures, and land, designed to be used for providing vocational education, including beauty and barbering schools, electronic training, photography, woodworking, automobile mechanics and typing.

Family—One person, or two or more persons related by blood, marriage or adoption, occupying a premises and living as a single non-profit housekeeping unit, as distinguished from a group occupying a hotel, club, motel or like establishment. A family includes domestic servants and may include up to

three non-paying and/or paying guests.

Forest Management Programs—Activities designed to maintain attractive and disease-free stands of trees, including the selective removal of unhealthy trees and the control of insects harmful to trees, but not including commercial growing and harvesting of forest products.

Forest Products Removal—Activities and uses with associated buildings, structures, roads and development devoted to the growing and harvesting of timber and other forest products for sale or for use in connection with development activities elsewhere.

Guest House—Detached living quarters of a permanent type of construction, without kitchens or cooking facilities, subordinate and incidental to the main residential building on the same building site and not rented as a transient dwelling unit.

Home Occupation—Any use customarily conducted entirely within a dwelling by inhabitants thereof, which is clearly incidental and secondary to the use of the character thereof, and in connection with which there are: no sales of products or services not produced on the premises; no employment of persons other than the residents of the dwelling; no generation of pedestrian or vehicular traffic beyond that normal to the district in which it is located; no use of commercial vehicles for deliveries to or from the premises; no signs or structures advertising the occupation; no excessive or unsightly storage of materials or supplies. For guidance, the following uses are home occupations: consultative professional occupations, whose function is one of rendering a service and does not

involve the dispensation of goods or products; a secondary business office, where said business has its principal office, staff and equipment located elsewhere; the making of clothing; the giving of music lessons; the creation of original artifacts; the home office of a salesman when all sales are done by written order with no commodities or displays on the premises. In no case shall more than one home occupation be carried on on the same presmises.

Indoor Amusement Establishment—Buildings and structures designed to be used by members of the public that contain amusement facilities such as movie theaters, bowling alleys, pool halls and skating rinks.

Land Coverage—A manmade structure, improvement or covering that prevents normal precipitation from directly reaching the surface of the land underlying the structure, improvement or covering. Such structures, improvements and coverings include roofs, surfaces that are paved with asphalt, stone, or the like such as roads, streets, sidewalks, driveways, parking lots, tennis courts, patios, and lands so used that the soil will be compacted so as to prevent substantial infiltration, such as parking of cars and heavy and repeated pedestrian traffic. A structure, improvement or covering shall not be considered as land coverage if it permits at least 75% of normal precipitation directly to reach the surface of the land underlying it.

Light Industrial—All manufacturing processing, service industrial activities, and like uses, conducted within a building or an enclosed area with adequate solid fences, that do not emit dust, odor,

noise, glare, heat, noxious gasses, smoke, or vibration from the exterior boundaries of their building sites.

Lot—An area of land occupied or to be occupied by a building or other structure, or to be used in connection with an activity, that is shown as a separately bounded area in a recorded subdivision plat or deed.

Major Road—Any highway, road or street, whether or not paved, more than twenty-two (22) feet in width and one thousand feet in length.

Medical Facilities—Buildings and uses related to the treatment and prevention of human disease, including hospitals, clinics, convalescent homes, and nursing homes.

Mobile Homes—"Mobile home" means a vehicular structure which is built on a chassis or frame, is designed to be used with or without a permanent foundation, is capable of being drawn by a motor vehicle and is used as a dwelling when connected to utilities.

Mobile Home Parks—A parcel of land under one ownership which has been planned and improved and which is let or rented or used for the placement of more than one mobile home for permanent residential use.

Multiperson Dwelling—A building designed primarily for permanent occupancy by individuals unrelated by blood, marriage or adoption in other than single family dwelling units or transient dwelling units. A multiperson dwelling includes such facilities as dormitories, but not such facilities as hotels, motels and apartment houses.

Organized Recreation Camps—Land or premises containing structures designed to be used for organized camping.

Outdoor Amusement Facilities—Outdoor amusement facilities are those that characteristically contain a high proportion of structures, improvements and land coverage in relation to uncovered land, machines and other devices, and are designed to be used by a large number of persons in relation to land area.

Outdoor Recreation—Uses and facilities pertaining to recreation activities that are carried on primarily outside of structures.

Outdoor Recreation Concessions—Uses and facilities ancillary to outdoor recreation uses, such as gasoline pumps at piers and marinas, and boat rental and food and beverage facilities at public beaches.

Overhead and Underground Utilities—Electric power transmission lines, telephone lines, and any other pipes or conduit and appurtenances used for the transmission of gas, water, sewage, or any other substance.

Parcel—An area of contiguous land owned by a person.

Permit-Issuing Authority—The local government within the territory of which the land use district, land capability district, proposed construction, use or land coverage is located, which government has the authority and obligation to enforce the standards established by this Ordinance.

Person—An individual, partnership, corporation, business association, or group of individuals and any governmental entity.

Private Recreation Areas—Land or premises designed to be used exclusively by owners and renters of single family dwelling units and their guests, and occupants of transient dwelling units or multiperson dwellings, that contain such facilities as tennis courts, playfields, swimming pools, clubhouses, bathing beaches, and piers.

Professional Office—An office for the conduct of professional services such as: accounting, advertising, architectural, legal counsel, drafting, dental, engineering, insurance, medical, and real estate. Professional services do not include activities normally involving animals, commercial vehicles or intensive patronage by the general public such as veterinary, general contracting, barber shops, beauty parlors, and pharmacies.

Public and Quasi-Public—Uses and facilities pertaining to communication, transportation, utilities, public services and education, including fire and police protection facilities, cultural facilities, religious facilities, schools, medical facilities, post offices, telephone, telegraph, television and radio systems, gas and electric systems, water, sewage, and disposal systems.

Quarry—Buildings, structures and land used for the removal of rock, sand, gravel, soil, aggregates and the like for sale or for use in connection with development activity elsewhere.

Recreation Vehicle Park—A parcel of land under one ownership which has been planned and improved and which is let or rented or used for the temporary placement of camp trailers and camping vehicles which are utilized for nonpermanent residential use.

Religious Facilities—Buildings, other structures, and land designed to be used for purposes of worship.

Residential—Uses and facilities pertaining primarily to the occupation of buildings for living, cooking, sleeping and eating by permanent residents, persons who own recreation homes, and tenants and guests of such residents and persons.

Resource Management and Agriculture—Uses and facilities for the utilization of natural resources such as forest products removal, grazing and mineral extraction.

Service Stations—Uses and facilities designed to provide services for motor vehicles and operations incidental thereto limited to retail sale of gasoline, oil, tires, batteries and accessories, automobile washing, tire changing and repairing, battery service, radiator cleaning, installation of minor accessories, lubrication of motor vehicles, brake repairs, and the testing, adjustment and replacement of such equipment as carburetors, coils, condensors, distributor caps, fan belts, filters, generators, points, rotors, spark plugs, voltage regulators, fuel pumps, water hoses, and wheel balancing.

Single Family Dwelling Unit—One room or group of two or more rooms, other than in a mobile home, containing one or more bedrooms, with not more than one kitchen, designed to be occupied permanently as an independent housekeeping unit by one family or one collective household with facilities for living, cooking, sleeping and eating.

Single Family House—A detached building containing one single family dwelling unit.

Skiing Facilities—Uses and facilities pertaining to skiing including, but not limited to, runs, towlines, cables, cars, warming huts, caretaking quarters, day lodges, shops for sale and rental of skiing equipment, ski pro shop, first aid stations, ski school assembly and instruction areas, and lounges and associated eating and drinking establishments, but not including residential or tourist residential uses and facilities.

Structure—Anything constructed or built, or any edifice or building of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner, which requires location on the ground or is attached to something having a location on the ground.

Subdivision—Any real property which is divided into two (2) or more condominiums or into five (5) or more lots, or in which five (5) or more undivided interests are created or are proposed to be created.

Tourist Residential—Uses and facilities pertaining primarily to the use of buildings and portions of buildings for living and sleeping by tourists and other transient visitors who rent by the day or week.

Tract Office—A structure other than a trailer or mobile home used to house activities relating to the sale or rental of dwelling units contained in the particular subdivision or other development in which the tract office is located. A tract office does not include a facility used for the purpose of the sale or rental of real property located outside the subdivision or other development with which it is primarily associated.

Transient Dwelling Units—One bedroom or a group of two or more rooms containing no more than one bedroom, and designed to be rented primarily by the day or week and to be occupied temporarily by one or more individuals whose permanent residence is elsewhere. Hotels and motels normally contain transient dwelling units.

Transportation Facility—Buildings, structures and land used for such purposes as bus terminals, railroad stations, and motor vehicle freight terminals, but not including airports or heliports.

Undeveloped Campgrounds—Land or premises designed to be used for temporary occupancy by campers traveling by foot or horse which may contain such facilities as fireplaces, but do not contain such facilities as are provided at Developed Campgrounds.

Water Crossing or Diversion Structures—Any structure designed to alter or cross any stream, river or other body of water.

Section 4.00 Permit Procedure

4.10 *When Required*

No person shall undertake or carry out any of the following activities without first obtaining a permit from the permit-issuing authority:

(1) Any construction or use involving the creation of land coverage on an area greater than 200 square feet;

(2) any construction or use for which an administrative permit or variance permit as required by this ordinance must first be issued by the permit-issuing authority.

4.20 *Application Form*

4.21 Applicants for permits shall submit the application and information required to the permit-issuing authority which shall review the application in accordance with the requirements of this ordinance, and recommend any changes which are necessary to satisfy the standards established by this ordinance. No permit shall be issued unless there is compliance with all the requirements of this ordinance.

4.22 *Information Required*

Applicants for permits required under Section 4.10(2) shall furnish a Land Capability Report prepared by a person or firm qualified by training and experience to have expert knowledge of the subject. The permit-issuing authority shall determine the adequacy of the report and may require the submission of further information where necessary. The report shall contain information as provided in Section 8.27 to the extent necessary to show that the standards required for the particular administrative permit or variance permit sought by the applicant have been satisfied and any other information required by this ordinance and by the adopted Rules and Regulations of Practice and Procedure of the Agency.

4.30 *Agency Review of Permits*

4.31 Permits required pursuant to Section

4.10(1), and any other permit required by the permit-issuing authority but not required by this ordinance, shall become final without the necessity of review by the Agency, provided, however, that the fact that a permit becomes final without the necessity of review by the Agency shall not foreclose any judicial action authorized by the Tahoe Regional Planning Compact to enforce the provisions of this Ordinance.

4.32 Administrative permits and variance permits required pursuant to Section 4.10(2) and issued by the permit-issuing authority shall be subject to Agency review, and upon review of any such permit the Agency shall take final action, whether to approve, to require modification or to reject such permit within 60 days after such permit is delivered to the Agency. If the Agency does not take final action within 60 days, the permit shall be deemed approved.

4.33 When an application for a permit is received by the permit-issuing authority, it shall immediately notify the Agency in writing of the following: (1) the fact that an application has been received; (2) the type of permit for which the application is made; and (3) the nature, scope and location of the construction, use, or

land coverage proposed. Upon receipt of such documents, the Executive Director of the Agency and its staff shall cooperate with the permit-issuing authority when requested to do so by the permit-issuing authority in interpreting and applying the standards of the ordinance to the construction, use or land coverage for which the permit application has been made.

4.34 The permit-issuing authority shall notify the Agency of all permits issued by it for any construction or use within the Lake Tahoe region. All permits issued and reported to the Agency shall be reviewed by the Agency staff, and all permits required pursuant to Section 4.10(2) shall be reported by the staff with staff recommendations to the Governing Body of the Agency for its review and action as provided in Section 4.32. The staff report and recommendations shall be available to the public at least 5 days prior to the meeting of which the permit issued pursuant to Section 4.10(2) is reviewed by the Agency. Reference to the permit shall be made in the agenda of such meeting and the applicant and other interested persons shall be afforded opportunity at such meeting to comment on the permit.

Section 5.00 Nature of Regional Land Use Ordinance

5.10 This section is descriptive and not directory and is only intended to explain in general terms the nature and operation of this Regional Land Use Ordinance which consists of the establishment of eleven (11) use districts in conjunction with seven (7) land capability districts within the territory of the Lake Tahoe Region.

5.20 This ordinance includes regulations concerning the uses permissible within each of the eleven (11) use districts, and concerning the permissible amounts of land coverage which may be created in connection with any development within each of the seven (7) land capability districts.

5.30 The boundaries of the use districts are established in the Tahoe Regional General Plan Map. The boundaries of the land capability districts are established in the Land Capability Map. Both maps are made a part of this ordinance.

5.40 The districts established and located by this ordinance, and the attendant regulations, are based upon the findings and analysis contained in the Tahoe Regional General Plan. The designations of the use districts reflect in part the environmental capabilities of the lands within the region as shown in the Land Capability Map and accompanying text, in addition to other factors including the appropriate interrelationships of land uses, transportation, utilities, public services, existing develop-

ment, recreational opportunities, and population. The designations of land capability districts reflect the capabilities of lands within the region to withstand disturbances, as established under the processes stated in the text accompanying the Land Capability Map.

5.50 The Land Capability Map identifies the capacities of the lands in the Region to withstand disturbance without risk of substantial harmful consequences occurring. These disturbances are expressed in this ordinance in terms of land coverage. Specific permitted amounts of land coverage are established for each land capability district. These specified amounts are intended as baseline standards only. They are subject to variation in any particular case upon a demonstration by an applicant, a local government, or the Agency, based upon detailed site investigation, that the land in question does not share the characteristics generally existent in the land capability district in which the land is located, or upon a similar demonstration by an applicant that a proposed development, as specifically designed and located, including mechanical and other means to moderate harmful consequences, will not cause the harmful environmental consequences that were the basis of the classification of the land in question in the district in which it is located. Any permitted variation in land coverage shall be subject to review by the Agency, as provided in Section 4.32.

Section 6.00 Land Capability Districts

6.10 There are seven land capability districts as established on the Land Capability Map and its accompanying text.

6.20 The limits on land coverage in each of said districts, except as otherwise provided in Sections 7.80 and 7.90, are as established in this section. Said limits are to be calculated in accordance with Sections 8.22 and 8.23 and are subject to modification in accordance with the provisions of Sections 8.25, 8.28 and 9.20.

Lands Located in Land Capability District Number	*Percentage of Land Area*
1	1%
2	1%
3	5%
4	20%
5	25%
6	30%
7	30%

Section 7.00 Use Districts

7.10 Regulations indicating the allowable land uses in each district are hereby established as set forth in Sections 7.20 through 7.120. In the cases of those uses listed in Section 7.12 the permit-issuing authority shall require an appropriate administrative permit, in accordance with Section 8.33, before such use shall be authorized. The permitted uses shall include accessory uses consistent with such permitted uses. The permitted uses are stated as illustrative of the types of uses consistent with the Tahoe Regional General Plan. The listings are not

intended to be exclusive, except the density limitations set forth in Sections 7.30 through 7.90.

7.11 *General Purposes*

(1) To protect ecologically fragile areas and the quality of the lakes of the Tahoe Region.
(2) To maintain the natural scenic quality of the Lake Tahoe Region.
(3) To assure population levels within the Region that will maintain an equilibrium between the Region's natural endowment and its manmade environment.

7.12 *Uses Requiring an Administrative Permit*

No person shall commence or carry out any of the following uses or activities, or erect any of the following structures, without first having obtained an administrative permit from the permit-issuing authority:

(1) Airports, heliports and landing strips
(2) Batch plants
(3) Bulk storage
(4) Commercial developments covering three or more acres
(5) Commercial forest products removal
(6) Commercial parking lots
(7) Construction in stream channels
(8) Fish and wildlife management projects
(9) Developed campgrounds
(10) Educational facilities, general
(11) Electric power plants
(12) Electrical substations
(13) Golf courses

(14) Harbors
(15) Hotels, motels and apartment houses of five or more units
(16) Marinas
(17) Medical facilities
(18) Mobile home parks
(19) Organized recreation camps
(20) Multiperson dwellings
(21) Outdoor amusement facilities
(22) Outdoor recreation concessions
(23) Overhead or underground utilities, but excluding service connections
(24) Public Services
(25) Highways, roads and structures
(26) Sewage treatment plant
(27) Water storage tanks & reservoirs
(28) Water treatment plant
(29) Quarries
(30) Recreation vehicle park
(31) Religious facilities
(32) Radio, TV and telephone relay stations and transmission lines and structures
(33) Skiing facilities
(34) Private stream crossing
(35) Solid waste transfer stations
(36) Transportation facilities
(37) Wrecking yards

7.13 *Limitations on Height*

No building or other structure erected in any land use district shall have a height greater than that specified below except that the permit-issuing authority, by administrative permit pursuant to Section 8.33, may authorize a greater height to the

extent that the permit-issuing authority determines that (1) provision has been made for protection from fire hazards and against aviation accidents; (2) consideration has been given to the protection of view and to the character of the neighborhood; (3) proper provision has been made for light and air; and (4) such greater height will better promote the protection of the environment in the area. Only those administrative permits that allow a building or other structure of a height of 45 feet or more shall be subject to Agency review pursuant to Section 4.32. Appurtenances such as chimneys and vents may be erected to a fifteen percent (15%) greater height than specified below. Building height shall be the vertical distance from the grade to the highest point of the coping of a flat roof, or to the deck line of a mansard roof, or the average height of the highest gable of a pitch or hip roof. Grade is the average of the finished ground level at the center of all walls of a building or structure.

Use District	*Permitted Height*
General Forest	35 feet
Recreation	35 feet
Rural Estates	35 feet
Low Density Residential	35 feet
Medium Density Residential	35 feet
High Density Residential	35 feet
Tourist Commercial	40 feet
General Commercial	40 feet

Public Service	40 feet
Conservation Reserve	As approved in a specific plan.
Medium Tourist Residential	35 feet

The above table of permitted heights may be modified with respect to residential buildings by permitting height limits of 35 feet plus one foot for each two percent (2%) of cross slope, measured at the building site coverage.

7.14 *Reclassification of Privately Owned Lands Within General Forest and Conservation Reserve Districts*

After two years from the effective date of this ordinance, an owner of lands within either the General Forest District or the Conservation Reserve District may apply, and the Agency shall then consider, whether to reclassify the applicant's lands to a less restrictive land use classification. In the event of such reclassification, either by an amendment of the Regional Plan or in any other appropriate manner, said lands shall nevertheless be subject to the Land Capabilities Map in effect on the date of reclassification.

7.20 *General Forest District*

7.21 *Specific Purposes:*

(1) To preserve outdoor recreational opportunities.

(2) To permit the growing and harvesting of timber, agricultural activities, and extraction of resources.

7.22 *Permitted Uses:*

None but the following uses, or those allowed pursuant to an administrative permit issued in accordance with Section 8.33, which are found to be appropriate and similar in nature, shall be permitted:

(1) *Residential:* None, except as provided in Section 9.14.

(2) *Tourist Residential:* None

(3) *Outdoor Recreation:*

(a) Hiking trails and undeveloped campgrounds;

(b) Developed campgrounds;

(c) Riding trails, pack stations, corrals, stables, and accessory facilities;

(d) Organized recreation camps;

(e) Skiing Facilities.

(4) *Resource Management and Agriculture:*

(a) Growing and harvesting timber and other forest products;

(b) Forest products removal;

(c) Forest management programs;

(d) Grazing livestock;

(e) Fish and wildlife management programs;

(f) Fire lookouts.

(5) *Public and Quasi-Public:*

(a) Major roads and water crossing structures;

(b) Radio, TV and telephone relay stations and transmission lines and structures;

(c) Overhead and underground utilities;

(d) Historic sites;

(e) Fire protection facilities;

(f) Water storage tanks and reservoirs;

(g) Sewage lift stations;

(h) Electrical substations.

(6) *Commercial:* None

7.23 *Limitations on Land Coverage*

No person shall create land coverages in excess of the limits set forth in Section 6.20.

7.30 *Recreation District*

7.31 *Specific Purposes:*

(1) To assure adequate public opportunity for outdoor recreation, including ski facilities, boating, day use areas, and access to public and quasi-public beaches in urban core areas and settlement node areas.

7.32 *Permitted Uses:*

None but the following uses, or those allowed pursuant to an administrative permit issued in accordance with Section 8.33, which are found to be appropriate and similar in nature, shall be permitted.

(1) *Residential:* None, except as provided in Section 9.14.

(2) *Tourist Residential:* None

(3) *Outdoor Recreation:*
  (a) All those permitted in the General Forest zone,
  (b) Day use areas,
  (c) Outdoor recreation concessions.
(4) *Resource Management and Agriculture:*
  (a) Forest management programs.
(5) *Public and Quasi-Public:*
  (a) All those permitted in the General Forest zone,
  (b) Educational facilities, avocational.
(6) *Commercial:* None

7.33 *Limitations on Land Coverage*

No person shall create land coverages in excess of the limits set forth in Section 6.20.

7.40 *Rural Estates District*

7.41 *Specific Purposes:*

(1) To provide for very low density residential uses primarily in those areas within the Region which have been developed in such a manner.

7.42 *Permitted Uses:*

None but the following uses, or those allowed pursuant to an administrative permit issued in accordance with Section 8.33, which are found to be appropriate and similar in nature, shall be permitted:

(1) *Residential:*
  (a) Single family dwelling units up to one dwelling unit per acre;
  (b) Accessory guest house and private stables.
(2) *Tourist Residential:* None
(3) *Outdoor Recreation:*
  (a) Private recreation areas;
  (b) Hiking and riding trails.
(4) *Resource Management and Agriculture:*
  (a) Forest management programs.
(5) *Public and Quasi-Public:*
  (a) All those permitted in General Forest District except broadcast and microwave relay stations.
  (b) Communications equipment building.
(6) *Commercial:* None

7.43 *Limitations on Land Coverage:*

No person shall create land coverages in excess of the limits set forth in Section 6.20.

7.50 *Low Density Residential District*

7.51 *Specific Purposes:*

To provide for low density residential uses primarily in those areas within the Region which have been so designated in the Regional Plan.

7.52 *Permitted Uses:*

None but the following uses, or those allowed pursuant to an administrative permit issued in accordance

with Section 8.33, which are found to be appropriate and similar in nature, shall be permitted:

(1) *Residential:*
  (a) Single family dwelling units up to four dwelling units per acre.
(2) *Tourist Residential:* None
(3) *Outdoor Recreation:*
  (a) All those permitted in the Rural Estate District;
  (b) Day use areas.
(4) *Resource Management and Agriculture:*
  (a) Forest management programs.
(5) *Public and Quasi-Public:*
  (a) All those permitted in the General Forest District, except broadcast and microwave relay stations;
  (b) Religious facilities;
  (c) Educational facilities, general;
  (d) Water treatment plant;
  (e) Communications equipment building.
(6) *Commercial:*
  (a) Home occupations;
  (b) Tract offices.

7.53 *Limitations on Land Coverage:*

No person shall create land coverages in excess of the limits set forth in Section 6.20.

7.60 *Medium Density Residential District*

7.61 *Specific Purposes:*

(1) To provide for residential uses consistent with the existing character of areas within the Region and environmental protection.

7.62 *Permitted Uses:*

None but the following uses, or those allowed pursuant to an administrative permit issued in accordance with Section 8.33, which are found to be appropriate and similar in nature, shall be permitted:

(1) *Residential:*
  (a) Single family dwelling units up to 8 dwelling units per acre.
(2) *Tourist Residential:* None
(3) *Outdoor Recreation:*
  (a) All those permitted in the low density residential district.
(4) *Resource Management and Agriculture:*
  (a) Forest management programs.
(5) *Public and Quasi-Public:*
  (a) All those permitted in the low density residential district;
  (b) child care nurseries;
  (c) police protection facilities;
  (d) medical facilities.
(6) *Commercial:*
  (a) All those permitted in the low density residential district.

7.63 *Limitations on Land Coverage:*

No person shall create land coverages in excess of the limits set forth in Section 6.20.

7.70 *High Density Residential District*

7.71 *Purposes:*

(1) To provide for residential uses consistent with the existing character of areas within the Region and environmental protection.

7.72 *Permitted Uses:*

None but the following uses, or those allowed pursuant to an administrative permit issued in accordance with Section 8.33, which are found to be appropriate and similar in nature, shall be permitted.

(1) *Residential:*

(a) Single family dwelling units up to 15 dwelling units per acre;

(b) Multiperson dwellings not to exceed facilities for 40 persons per acre;

(c) Mobile home parks for permanent residences up to 8 mobile homes per acre.

(2) *Tourist Residential:* None

(3) *Outdoor Recreation:*

(a) All those permitted in the Medium Density Residential District.

(4) *Resource Management and Agriculture:*

(a) Forest management programs.

(5) *Public and Quasi-Public:*

(a) All those permitted in the Medium Density Residential District;

(b) Cultural facilities.

(6) *Commercial:*

(a) All those permitted in the Medium Density Residential District;

(b) Professional offices.

7.73 *Limitations on Land Coverage:*

No person shall create land coverages in excess of the limits set forth in Section 6.20.

7.80 *Tourist Commercial District*

7.81 *Specific Purposes:*

(1) To provide adequate space for motels, hotels and related facilities to house and provide services for tourist visitors to the Region in appropriate locations.

7.82 *Permitted Uses:*

None but the following uses, or those allowed pursuant to an administrative permit issued in accordance with Section 8.33, which are found to be appropriate and similar in nature, shall be permitted:

(1) *Residential:*

(a) Single family dwelling units up to 15 dwelling units per acre;

(b) Multiperson dwellings not to

exceed facilities for 40 persons per acre;

(c) Mobile home parks for permanent residences up to 8 mobile homes per acre.

(2) *Tourist Residential:*

(a) Transient dwelling units up to 40 units per acre, provided that up to 10% of such dwelling units contained in any motel or other development devoted to the provision of transient dwelling units may include kitchen facilities;

(b) Recreation vehicle parks up to 15 mobile homes per acre.

(3) *Outdoor Recreation:*

(a) All those permitted in the High Density Residential District;

(b) Skiing facilities;

(c) Outdoor amusement facilities.

(4) *Resource Management and Agriculture:*

(a) Forest management program.

(5) *Public and Quasi-Public:*

(a) All those permitted in the High Density Residential District;

(b) Transportation facilities.

(6) *Commercial and Industrial:*

(a) All those permitted in the

High Density Residential District;

(b) Indoor amusement facilities;

(c) Limited commercial;

(d) Service stations.

7.83 *Limitations on Land Coverage:*

No person shall create land coverages in excess of thirty-five (35) percent if a residential use and fifty (50) percent if any other use of the land area included in the application for a permit, as calculated in accordance with Section 8.22 of this ordinance, except as otherwise permitted in accordance with Sections 8.25, 8.28 and 9.24 of this ordinance.

This provision shall apply only to those lands contained in Tourist Commercial Districts as shown on the Tahoe Regional Plan as originally adopted. The limitations on land coverage set forth in Section 6.20 shall be applicable to lands which may be reclassified into such district in the future unless the ordinance effecting such reclassification specifically provides otherwise.

7.90 *General Commercial District*

7.91 *Specific Purposes:*

(1) To assure adequate areas in appropriate locations for commercial services necessary within the Region.

7.92 *Permitted Uses:*

None but the following uses, or those allowed pursuant to an appropriate administrative permit issued in accordance with Section 8.33, which are found to be appropriate and similar in nature, shall be permitted.

(1) *Residential:* None except that accessory to the permitted use.

(2) *Tourist Residential:*

(a) All those permitted in the Tourist Commercial district.

(3) *Outdoor Recreation:*

(a) All those permitted in the Tourist Commercial district.

(4) *Resource. Management and Agriculture:*

(a) Forest management programs.

(5) *Public and Quasi-Public:*

(a) All those permitted in the Tourist Commercial district;
(b) Commercial;
(c) Light industrial;
(d) Batch plants;
(e) Bulk storage;
(f) Electric power plant;
(g) Wrecking yard.

7.93 *Limitations on Land Coverage:*

No person shall create land coverages in excess of seventy (70) percent of the land area included in the application for a permit, as calculated in accordance with Section 8.22 of this ordinance, except as otherwise permitted in accordance with Sections

8.25, 8.28 and 9.23 of this ordinance.

This provision shall apply only to those lands contained in Commercial districts as shown on the Tahoe Regional Plan as originally adopted. The limitations on land coverage set forth in Section 6.20 shall be applicable to lands which may be reclassified into such district in the future unless the ordinance effecting such reclassification specifically provides otherwise.

7.100 *Public Service District*

7.101 *Specific Purposes:*

(1) To provide a district category that enables the coordinated placement of public facilities.

7.102 *Permitted Uses:*

(1) *Residential:*
None, except those directly related to permitted Educational Facilities.

(2) *Tourist Residential:* None

(3) *Outdoor Recreation:*
None, except those directly related to permitted Educational Facilities.

(4) *Resource Management and Agriculture:*

(a) Forest management programs.

(5) *Public and Quasi-Public:*

(a) All those permitted in the General Commercial District;
(b) Airports.

(6) *Commercial and Industrial:* None.

7.103 *Limitions on Land Coverage:*

No person shall create land coverages in excess of the limits set forth in Section 6.20.

7.110 *Conservation Reserve District*

7.111 *Specific Purposes:*

(1) To identify those lands susceptible to future development pursuant to the preparation of specific plans indicating the impacts on the Region of the proposed land use, population density, transportation, flood control, forest and wildlife conservation, water quality control, environmental protection, community design, recreation, schools, and other necessary facilities.

7.112 *Permitted Uses:*

(1) All those permitted in the General Forest District;

(2) Uses permitted pursuant to special regulations of this ordinance.

7.113 *Limitations on Land Coverage:*

No person shall create land coverages in excess of the limits set forth in Section 6.20.

7.120 *Medium Tourist Residential*

7.121 *Specific Purposes:*

To provide for tourist residential uses consistent with the existing character of areas within the region and environmental protection.

7.122 *Permitted Uses:*

None but the following uses, or those allowed pursuant to an administrative permit issued in accordance with Section 8.33 which are found to be appropriate and similar in nature, shall be permitted:

(1) *Residential:*

(a) Single family dwelling units up to eight (8) dwelling units per acre;

(b) Multiperson dwellings not to exceed facilities for twenty-five (25) persons per acre;

(c) Mobile home parks for permanent residences up to six (6) mobile homes per acre.

(2) *Tourist Residential:*

(a) Transient dwelling units up to twenty-five (25) units per acre provided that one unit contained in the development, to be used as a permanent residential unit, may contain kitchen facilities.

(b) Transient dwelling units with kitchen facilities up to fifteen (15) per acre.

(3) *Outdoor Recreation:*

(a) All those permitted in the High Density Residential district;

(b) Outdoor amusement facilities.

(4) *Resource Management and Agriculture:*
   (a) Forest management programs.
(5) *Public and Quasi-Public:*
   (a) All those permitted in the High Density Residential district;
   (b) Transportation facilities.
(6) *Commercial and Industrial:*
   (a) All those permitted in the High Density Residential district;
   (b) Indoor amusement facilities.

7.123 *Limitations on Land Coverage:*
No person shall create land coverages in excess of the limits set forth in Section 6.20.

Section 8.00 Effects of Establishing Districts

8.10 *Establishment of the Location of Districts*

8.11 The designations, locations and boundaries of the aforesaid use districts and combinations thereof are shown on the Tahoe Regional General Plan Map which has been adopted by the Agency by ordinance.

8.12 The designations, locations and boundaries of the aforesaid land capability districts are shown on the Land Capability Map which has been adopted by the Agency by ordinance.

8.13 *Precise Boundaries*
When local governments adopt ordinances conforming with the standards established by this ordinance, such ordinances shall establish boundary lines that precisely locate the use and land capability districts as shown on the maps referred to above. In the absence of conforming ordinances, when uncertainty exists with respect to the boundaries of any of said districts because of the scale of the maps or for any other reasons which make exact boundary determinations difficult or uncertain, the permit-issuing authority, when necessary in a particular case, shall establish a precise boundary line. In either of the above cases reference shall be made to any enlarged maps showing such districts prepared by the Agency, and the following standards shall be applied:

(1) Where use district boundaries appear to follow the center line or street or highway line of streets or highways, such lines shall be treated as the use district boundaries.
(2) Where use district boundaries appear to be approximately parallel to the center

lines or street or highway right-of-way lines of streets or highways, use district boundaries shall be placed parallel to such lines and at such distance therefrom as indicated on the Land Use Map.

(3) Where use district boundaries appear to follow ownership boundaries, such ownership boundaries shall be treated as the use district boundaries.

(4) The location of precise boundaries or land capability districts shall reflect the ecological and other considerations that led to the classifications of the lands in the districts that the boundary lines will separate. Reference shall be made to the text accompanying the Land Capability Map. Minor adjustments in lot and small parcel boundaries may be made to conform to ownership lines.

8.20 *Effects of Establishing Land Capability Districts*

8.21 Except as provided hereinafter, no land coverages in excess of the maximum for the districts as established in Sections 6.00 and

7.00 shall be permitted by the permit-issuing authority or shall be carried out by any person.

8.22 *Calculation of Land Area*

The area in connection with which the permissible amount of land coverages shall be calculated shall consist of all that land owned or controlled by the applicant designated in the permit application as part of the land development for which the permit is sought. Where no permit is required, the area shall include all that land normally considered as part of the land development in question. In addition to the foregoing:

(1) The area upon which the calculation is based shall not include bodies of water, such as lakes and ponds, or those lands underlying covered surfaces associated with regional public facilities such as regional roads and regional sewer lines that are or will be constructed or administered by public agencies and which primarily serve or will serve the needs of persons other than those who are, or will be, residents of the lands in question or customers of the

owners or users in such lands. In determining whether a public facility is regional, consideration shall be given to whether such facility would be necessary without the proposed development project of the applicant. To the extent that such public facility would not otherwise be necessary, the lands underlying such covered surfaces shall come within this Subsection 8.22(1).

(2) A separate calculation shall be made for the lands in such areas that are contained in different land capability districts. The permissible extent of land coverage for the lands within each district can only be carried out on those lands within such district and cannot be transferred to lands in other districts within such areas.

8.23 *Calculation of Amount of Permissible Land Coverage*

The amount of permissible land coverage shall include land coverage previously authorized in connection with, or carried out within, the area designated, ex-

cept that land coverage associated with regional public facilities such as regional roads and sewers that are or will be constructed or administered by public agencies and which primarily serve the needs of persons other than those who are, or will be, residents of the lands in question, or customers of the owners or users of such lands, shall be excluded from the calculation. Land coverage associated with roads and other facilities required because of the development, or which primarily serve or will serve the development, shall be included in the calculation.

8.24 *Application to Certain Roads, Utilities and Other Public Facilities*

As provided in Section 8.23, the limitations on land coverage established by this ordinance shall not include certain regional public facilities. No such regional public facility, however, shall be constructed except in conformity with an administrative permit issued by the permit-issuing authority pursuant to Section 4.10(2) following the submission of a Land Capability Report. The criteria upon which the permit-issuing authority shall determine

whether or not to issue such permit, and if so the conditions to be imposed, shall include:

(1) The need for such facility in the location proposed in view of the estimated demand for the services required by the permitted development within the Land Capability Districts, chiefly served by the facility, and by the Region generally;

(2) The land capability of the area upon which the facility is proposed to be located;

(3) An estimate of the environmental harms that will be created by the proposed facility in the proposed location; and

(4) The conformity of the plans for such proposed facility with the requirements established in other ordinances adopted by the Agency.

8.25 *Additional Land Coverage—Administrative Permit*

Land coverages in excess of those permitted in any land capability district may be authorized by administrative permit issued by the permit-issuing authority upon a showing in a Land Capability Report by the

applicant, in accordance with the applicable provisions of the Rules and Regulations of Practice and Procedure, that:

(1) the land of the applicant seeking the permit exhibits the characteristics generally existent in a land capability district other than the one in which it has been located, that the limitations of such other district are therefore properly applicable to such land, and that the proposed excess land coverage will not cause substantial harmful environmental consequences on the land of the applicant or on other lands or waters; or

(2) the applicant's proposed development, as designed and located, will not cause the detrimental environmental consequences on the land of the applicant, or on other lands or waters, that were the basis of the classification of the applicant's land in the applicable land capability district in the first instance;

(3) the excess land coverage is to be created in connection with the construction of a single family house on an ex-

isting lot and (a) is required to provide a driveway or parking area, (b) will not result in a residential structure larger than would otherwise be permitted, (c) will result in the siting of the single family house on the existing lot in such a manner so that the natural environment on such lot, especially the preservation of trees and other flora, is better protected than if permission for such excess land coverage was denied, and (d) the site plan is designed to minimize land alterations, such as grading and the removal of vegetation. Such excess land coverage when authorized by the permit-issuing authority may be approved by the executive officer subject to subsequent ratification of the Governing Body of the Agency.

8.26 Land coverage maximums may be reduced when the permit-issuing authority determines on the basis of an applicant's Land Capability Report and studies and evaluations carried out in connection with an application for an administrative permit under this section that the land of the applicant exhibits the characteristics generally existent in a land capability district other than the one in which it has been located.

8.27 *Land Capability Report*

The Land Capability Report submitted by the applicant pursuant to Section 8.25 shall contain information concerning the environmental and use capacity of the lands within and adjacent to the proposed development and the probable effects of proposed land uses and land coverages.

(1) With respect to environmental and use capacity, the Report shall contain detailed information (as prescribed in guides, if any, issued by the Agency) concerning topography and slope; geologic conditions and hazards, soil properties, capabilities, and limitations; surface and ground water conditons; vegetation characteristics; and related environmental factors pertinent to the property.

(2) With respect to the effects of proposed land uses and land coverages, the Report shall contain detailed maps and

other information (as prescribed in guides, if any, issued by the Agency) concerning grading, planting revegetation, landscaping, drainage, and other means proposed to avoid the environmental problems characteristic of the site; a preliminary site plan showing lot lines, roads, and buildings; a statement as to the impact of the proposed uses on educational facilities, fire and recreational facilities, and commercial services and facilities; and a statement as to other off-site implications of the proposed uses (such as the availability of water, power and sewage treatment).

(3) In the case of an application pursuant to Section 8.25(3), the Land Capability Report need establish only that standards of that section have been satisfied.

8.28 *Additional Land Coverage—Variance*

Land coverage in excess of that permitted in any land and capability district, up to the maximums stated in this section, may be authorized by a variance per-

mit issued by the permit-issuing authority, where a literal enforcement of the ordinance deprives such property of privileges enjoyed by other property in the vicinity and within the same land capability district, and the applicant shows that he cannot make any reasonable use of his property if such regulations are applied. Where such conditions are found, the additions permitted shall be the minimum departure from existing maximums reasonably necessary to avoid the deprivation of privileges enjoyed by such other property and to facilitate a reasonable use, and which will not create significant probabilities of substantial harmful environmental consequences. In no case may a variance permit be granted that provides the applicant with any special privileges not enjoyed by other properties in the vicinity. The maximum permissible additions shall not exceed 100% of the limits on land coverage in land capability districts 1, 2 and 3, and 10% of the limits on land coverage in land capability districts 4, 5, 6 and 7, as set forth in Section 6.20.

8.30 *Effects of Establishing Use Districts*

8.31 Except as provided hereinafter, no person shall, and the permit-issuing authority shall not permit any person to erect any buildings; move, alter, add to, or enlarge any existing building; use, designate, or intend to use for any purpose any land, building or premises in any manner other than is included among the uses listed as permitted in the use district in which such building, land, or premises is located.

8.32 *Calculation of Densities*

The number of dwelling units per acre permitted in a Rural Estate, Low, Medium or High Density Residential, Medium Tourist Residential, and Tourist Commercial District, and transient dwelling units per acre permitted in a Medium Tourist Residential, Tourist Commercial and Commercial District, shall be determined in the first instance on the dwelling units per acre permitted in the use district in which the land is located. Such number of permitted dwelling units per acre may be limited below the maximums expressed by virtue of the limitations on land coverage applicable within the land capability district within which the land is located. In addition to the foregoing, the area upon which the appropriate density calculation is based shall not include existing bodies of water such as lakes and ponds. Densities up to ten percent (10%) in excess of the maximums permitted may be authorized by the permit-issuing authority where the applicant's plans provide for a total amount of land coverage, as calculated in accordance with Sections 8.22 and 8.23, five percent (5%) or more below the baseline maximums established for the land capability districts within which the land is located, and it is determined that increase in density will not cause substantial problems of traffic congestion or inadequacy of public services.

8.33 *Administrative Permits*

Administrative permits may be issued for any of the uses or purposes for which such permits are required by the terms of this ordinance. Such permit may be granted only if it is found by the permit-issuing authority that the establishment, maintenance, or operation of the use or purpose in the particular case is not detrimental to health, safety, peace, morals, comfort and general wel-

fare of persons residing or working in the neighborhood of such proposed use, or detrimental or injurious to property and improvements in the neighborhood or to the general welfare of the Region, and will not cause any substantial harmful environmental consequences on the land of the applicant or on other lands or waters.

8.34 *Variances*

Variances from the terms of the use regulations established in this ordinance shall be granted by the permit-issuing authority only if it is found that because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the use regulations deprives such property of privileges enjoyed by other property in the vicinity and within the same use district, and the applicant shows that he cannot make any reasonable use of the property if such regulations are applied. Where such conditions are found, the variance permitted shall be the minimum departure from existing regulations necessary to avoid such deprivation of privileges enjoyed by such other

property and to facilitate a reasonable use, and which will not create significant probabilities of harm to property and improvements in the neighborhood or of substantial harmful environmental consequences. In no case may a variance be granted that will provide the applicant with any special privileges not enjoyed by other properties in the vicinity.

Section 9.00 Non-Conforming Uses, Structures and Alterations

9.11 *Existing Uses and Structures*

Uses of land and structures that do not conform to the regulations established by this ordinance and which lawfully existed on February 10, 1972, or which are to be created in connection with structures for which a valid building permit was issued on or before February 10, 1972 and upon which construction has commenced as allowed by such permit prior to February 10, 1972, or which are to be created in connection with a subdivision the final map of which was approved by the appropriate local government and where necessary by the Agency within five (5) years prior to February 10, 1972, or which are to be created in connection with a subdivision the final map of which was approved by the appropriate local government more than five (5) years prior to February 10, 1972 and there has been construction of roads, sew-

ers, or other substantial facilities serving the subdivision, or the posting of performance bonds assuring such construction prior to February 10, 1972 are non-conforming uses and structures and may be continued, transferred or sold, provided, however, in the case of a use to be created it shall occupy no greater area than planned at the time such building permit was issued or subdivision approved. If any such use ceases for a period of one (1) year, subsequent use of such land shall be in conformity with the regulations contained in this ordinance.

9.12 *Repair of Non-Conforming Uses and Structures*

Ordinary maintenance and repairs may be made to any non-conforming building or structure, or any use, provided, however that no structural alterations are made and that the cost of such work does not exceed 20% of the replacement value of such building or structure in any one year.

9.13 *Reconstruction of Non-Conforming Structures*

A non-conforming building or structure, or any building or structure devoted to a non-conforming use, damaged by fire or calamity may not be reconstructed other than in accordance with the provisions of this ordinance unless the cost of reconstruction does not exceed 50% of the replacement cost of such building or

structure prior to the damage having occurred. Where reconstruction is permissible, the buildings as reconstructed shall have no greater floor area than it had prior to being damaged.

9.14 *Single Family Houses on Pre-Existing Lots and Parcels*

One single family house may be constructed on any existing legal lot or parcel of record as of February 10, 1972 that is located in any district except Tourist Commercial or Commercial, provided, however, that this section shall not apply to lots in residential subdivisions where the final map of such subdivision was approved and filed for record more than five (5) years prior to February 10, 1972 and there has been no construction of roads, sewers, or other substantial facilities serving the subdivision, or the posting of performance bonds assuring such construction, prior to February 10, 1972.

9.20 *Land Capability Regulations*

9.21 *Existing Land Coverage*

Land coverage lawfully created prior to the effective date of this ordinance that does not conform to the regulations established by this ordinance is non-conforming land coverage and may be continued.

(1) *Repair of Non-Conforming Land Coverage*

Ordinary maintenance and repairs may be made to any non-conforming land coverage, provided, however, that where the non-conforming land coverage consists of a non-conforming building or structure as provided in Section 9.12, the cost of such work does not exceed 20% of the replacement value of such non-conforming land coverage in any one year.

(2) *Reconstruction of Non-Conforming Land Coverage*

Non-conforming land coverage that consists of a non-conforming building or structure as provided in Section 9.13 that is damaged by fire or calamity may be reconstructed only if such reconstruction is permitted under the provisions of Section 9.13. If such non-conforming land coverage consists of a building or structure which conforms to the use district regulations and is damaged by fire or calamity it may be reconstructed as provided in subsection (3) of this section.

(3) *Replacement of Non-Conforming Land Coverage*

Non-conforming land coverage may be replaced pursuant to an administrative permit other than as provided in subsection (1) of

this section only as follows:

(a) Non-conforming land coverage which consists of a building may be replaced in total.

(b) Non-conforming land coverage other than a building may be replaced in total by non-conforming land coverage of a similar kind, type and use. Such non-conforming land coverage, however, may be replaced by a building or an extension of an existing building only if other land coverage on the same parcel is removed in an amount which is the lesser of (i) the amount of land coverage created by such building or extension, or (ii) such amount of land coverage so that the total land coverage on the parcel complies with the land coverage limitations of the use and land capability districts within which the parcel is located.

(c) Ordinarily, permitted replacements of non-conforming land coverage must be installed at the same location on the parcel where the non-conforming land coverage existed. Where the following is found, however, an appli-

cant may be permitted to locate such replacement on an alternative site on the same parcel:

(i) The applicant demonstrates beyond any reasonable doubt that the relocation to the alternative site will protect and enhance the natural environment of the parcel and surrounding lands to a substantially better extent than replacement on the original site.

(ii) The total non-conforming land coverage that exists on the parcel before the replacement will be reduced in amount by at least 10%, provided, however, that in the case of a replacement to which the provisions of subsection (b) (i) or (b) (ii) apply the reduction must be to 10% less than would otherwise be required.

(d) Applicants seeking to replace non-conforming land coverage must apply for the necessary administrative permit within six (6) months after the effective

date of this ordinance or within six (6) months after the demolition of the non-conforming land coverage which the applicant seeks to replace, whichever period is greater.

9.22 *Where Building Permit Previously Issued*

The limitations on land coverage established by this ordinance shall not apply to land coverage created or to be created in connection with a structure for which a valid building permit was heretofore issued on or before February 10, 1972, and upon which construction has commenced as allowed by such permit prior to the effective date of this ordinance, or which is to be created in connection with a subdivision the final map of which was approved by the appropriate local government and where necessary by the Agency within five (5) years prior to February 10, 1972, provided, however, that such coverage shall be no greater in size than planned at the time such building permit was issued, or subdivision approved.

9.23 *Pre-Existing Lots and Parcels in Medium Density Residential, High Density Residential and Medium Tourist Residential Districts*

The following land coverage limita-

tions, if greater than the percentages otherwise allowed in the land capability districts in which the lot or parcel in question is located, shall apply to existing lots or parcels of record as of February 10, 1972, that are two (2) acres or less in size and that are located in the following use districts:

Use District	*Land Coverage Limitations*
Medium Density Residential	35%
High Density Residential	50%
Medium Tourist Residential	35%

9.24 *Pre-Existing Lots in Subdivisions*

The following land coverage limitations, if greater than the amounts otherwise allowed in the land capability districts in which the lot in question is located, shall apply to lots contained in any subdivision, a final map of which was approved by a local government, and where required, by the Agency, prior to February 10, 1972, provided, however, that this section shall not apply where the final map of such subdivision was approved and filed for record more than five (5) years prior to February 10, 1972 and there has been no construction of roads, sewers, or other substantial facilities serving the subdivision, or the posting of performance bonds assuring such construction, prior to February 10, 1972:

Lot Size (in Sq. Feet)	*Lot Coverage (in Sq. Feet)*
Under 9000	2,600
9,001–13,000	2,800
13,001–15,000	3,000
15,001–30,000	3,200
30,001–40,000	3,400
40,001–86,000	3,600
86,001–172,000	3,800
172,001–430,000	4,000
Over 430,000	1% of the Lot Area

9.25 *Pre-Existing Lots and Parcels Eligible for Single Family House in General Forest and Recreation Districts*

Where a single family house may be constructed pursuant to Section 9.14, the land coverage limitations provided in Section 9.24 shall apply if greater than the amounts otherwise allowed in the land capability districts in which they are located.

9.30 *Creation of Lots or Parcels*

No person shall create a lot or parcel upon which there will exist more than the maximum number of dwelling units or maximum percentage of land coverage permitted by this ordinance, provided, however, that more than such maximums may be created in connection with a subdivision, the tentative map of which is approved by the Agency pursuant to the provisions of the Tahoe Regional Planning

Agency Subdivision Ordinance.

9.31 Where a lot or parcel is divided, the person making the division shall calculate the number of dwelling units and land coverage allocable to each of the resulting lots or parcels and shall note such allocations in the deeds to such resulting lots or parcels and on the lot or parcel map, if any, that is used to record such division.

Section 10.00 Compact Limitations

The provisi_ns of this Ordinance shall be subject to the express requirement contained in Article VI(a) of the Compact (PL 91-148) which requires that:

"Every plan, ordinance, rule, regulation or policy adopted by the agency shall recognize as a permitted and conforming use any business or recreational establishment which is required by law of the state in which it is located to be individually licensed by the state, if such business or establishment:

(1) Was so licensed on February 5, 1968, or was licensed for a limited season during any part of the calendar year immediately preceding February 5, 1968.

(2) Is to be constructed on land which was so zoned or designated in a finally adopted master plan on February 5, 1968, as to permit the construction of such a business or establishment."

Section 11.00 Violation of Ordinance

Violation of any provision of this ordinance shall be a misdemeanor.

This document is a true and correct edition of the Land Use Ordinance of the Tahoe Regional Planning Agency.

4 August 1977

By: Jacqueline E. Veiga
Secretary-Treasurer for: Tahoe
Regional Planning Agency

APPENDIX F

[MINUTES]
[HOTEL OLIVER]

DOUGLAS COUNTY BOARD OF COUNTY COMMISSIONERS

April 24, 1973

This Special Meeting of the Douglas County Board of Commissioners was held this day at 4:30 p.m. at the County Court House, Minden, Nevada. Present were Harold Dayton, Chairman, Charles Meneley and Roy Godecke, Commissioners. Also present were Jim Rankin, Public Works Director, Roland Adams, County Planner, Tom Eck, Deputy District Attorney, Howard McKibben, District Attorney, and Earnhart Thran, County Clerk.

A list of general and salary claims were read and approved as further set forth in the office of the County Recorder.

. . .

IN THE MATTER OF
OLIVER KAHLE—SPECIAL USE PERMIT

Mr. Ray Smith representing Oliver Kahle stated Mr. Kahle was seeking a final Special Use Permit from the County Commissioners concerning a 1,000 room casino-hotel to be constructed on Mr. Kahle's property located on the corner of US 50 and Kingsbury Grade.

Mr. Ray Smith further stated the property currently is the sight of a mobile home park and a parking lot.

Part of the property has some tree cover. The property is 25 acres of somewhat irregular shaped contours. The

property is totally served with all of the utilities, sewer, water, etc., and capable of handling this kind of facility.

Mr. Godecke asked what the location of the hotel would be on the property?

Mr. Smith stated the trailers would be totally removed and the main entry point would be at Kahle Drive, Mr. Smith used a map of the property showing the proposed plans.

Mr. Dayton asked how high the building would be?

Mr. Smith stated it would be 68 feet above the back top property line.

Mr. Smith read from an environmental impact report which stated the population increase resulting from this project would be about 2,670 new employees with about 900 living in Douglas County, according to the present ratios.

Mr. Godecke asked if Mr. Smith had figures on population increases from all known proposals?

Mr. Smith stated there are approximately 5,680 total employees working at gaming establishments in Stateline. There would be an approximate increase of 6,595 employees when all known proposals are completed—if they are given approval. This would be a total of 12,275 employees. Presently about ¼ to ⅓ of the employees live in Nevada. The additional hotels and enlargements will probably have a somewhat similar distribution with a stronger accent on Nevada living, especially in Carson Valley. This is expected to be a total of 6,942 living in California, 1,645 living in Douglas County, Lake Tahoe,

1,718 living in Carson Valley and 973 living in Carson City.

Mr. Begley asked about traffic impact on Kingsbury Grade.

Mr. Roland Adams, County Planner, asked about the proposed realignment of Kingsbury Grade.

Mr. Smith stated as a "rule of thumb" each hotel room generates about 10 cars a day. This includes gaming, service and other traffic as well. The present Kingsbury Grade is estimated to be causing about 200 cars per day attributable to Carson Valley residents employed at Stateline. The proposed expansions would add about 1,-500 total volume, at 2.5 employees per car (2 ways).

The proposed realignment of Kingsbury Grade would cause a need to shift the position of the parking garage, stated Mr. Smith.

Mr. Roland Adams, stated this is a conflict and it must be solved.

Mr. Jim Rankin showed a map of one proposal explaining where the intersection would be.

Mr. Dayton stated we could approve Oliver's on the same basis as we did Parks proposal.

Mr. Smith said the only entity that can solve this traffic problem is Douglas County.

Mr. Adams asked of Tom Eck, Deputy District Attorney, what would happen if this proposal of realignment went through.

Tom Eck stated you would probably have to have a review on consideration of sight design before the Planning Commission.

Mr. Charles Meneley made a motion to approve this proposal with the following restrictions.

It is recommended therefore, that this Special Use permit be granted with the following conditions which shall be met prior to the issuance of any permits by Douglas County.

1. That the directives pointed out in the Environmental Information Report shall be met.

2. That an Environmental Information Report in final form shall be supplied to the County for review and approval as outlined by the Tahoe Regional Planning Agency.

3. That the rights-of-way and improvements therein shall be constructed prior to the issuance of a certificate of occupancy. Such roads and rights-of-way described shall be sufficient to meet the traffic and transportation requirements as depicted in the Environmental Information Report, "Transportation and Circulation Impact".

TRAFFIC SOLVED BEFORE A BUILDING PERMIT.

4. That the parking lot shall be redesigned taking into consideration existing topography, tree cover and vegetation and landscaped areas provided throughout in compliance with the objectives of Douglas County and the TRPA regulations and Ordinances to the satisfaction of the Public Works Director.

5. That the building exterior, color and type, be precisely determined.

6. That signing is not made a part of this Special Use Permit but will be considered independently at a later date upon application for same.

Mr. Godecke seconded the motion. Motion unanimously carried.

There being no further business this meeting was adjourned until the next regular meeting of the Douglas County Commissioners on May 7, 1973 at 10:00 a.m.

. . .

RESOLUTION FOR BOARD OF COUNTY COMMISSIONERS OF DOUGLAS COUNTY REGARDING OLIVER KAHLE'S PROPOSED CASINO-HOTEL

The application of Oliver Kahle for the construction of a one thousand (1,000) room hotel at the intersection of US 50 and Kingsbury Grade in the Stateline area of Douglas County have been presented to the Board of County Commissioners of Douglas County and body having considered the environmental and community impact effects upon the development of the Lake Tahoe Basin, said Commissioners do hereby find:

1. That the proposed project does not endanger the natural beauty and economic productivity of the Lake Tahoe Basin.

2. That it preserves the scenic beauty of the area and enhances the recreation opportunities of the region and does constitute an orderly development of the area.

3. That the said project is to be constructed on land which was zoned for the use and businesses to be conducted thereon, which was so designated in the finally adopted Master Plan of February 5, 1968.

4. That the project does conform to all of the ordinances of Douglas County and the Tahoe Regional Planning Agency, save and except as to the limitation on height contained in Article 7.13 of the Land Use Ordinance of the Tahoe Regional Planning Agency, adopted February 10, 1972.

5. That pursuant to Article 8.33 of the said Land Use Ordinance, it is recommended that the permit issuing authority issue a permit for the project for the heights

as shown in the plans submitted because the said Board of County Commissioners has found that the maintenance and operation in his particular property is not detrimental to the health, safety, peace, morals, comfort and general welfare of persons residing or working in the neighborhood of the project and that the proposed project is not detrimental to or injurious to property or improvements in the neighborhood or to the general welfare of the region and will not cause any substantial, harmful environmental consequences on the land involved or on other lands or waters.

6. That it appears that the project will be of benefit to the general welfare of the region and will create substantial environmental benefits on the land involved and to other lands in the area.

The said Board of County Commissioners of Douglas County does also find that in connection with the greater height than is set out in Article 7.13, that: (1) provision has been made for protection from fire hazards and there is no need for protection against aviation accidents; (2) consideration has been given to the protection of view and to the character of the neighborhood; (3) proper provision has been made for light and air; and (4) such greater height will better promote protection of the environment of the area.

Chairman _____
Board of County Commissioners
Douglas County, Nevada

[MINUTES]
[TAHOE PALACE]

DOUGLAS COUNTY BOARD OF COUNTY COMMISSIONERS

May 7, 1973

The Douglas County Board of County Commissioners met this day at 10:00 a.m. in the Commissioners Room of the Court House, Minden, Nevada. Present were Harold Dayton, Chairman, Charles Meneley and Roy Godecke, Commissioners. Also present were Howard McKibben, District Attorney, Tom Eck, Deputy District Attorney, Jim Rankin, Director of Public Works, and Roland Adams, County Planner, Darwin Ellis, Fire Chief, and Earnhart Thran, County Clerk.

A list of general and salary claims were read and approved as further set forth in the Office of the County Recorder.

. . .

IN THE MATTER OF JENNINGS—SPECIAL USE PERMIT

Mr. Dayton stated Mr. Jennings plans have been through the Planning Commission.

Mr. Ray Smith, representing Mr. Jennings, stated he was presenting the plans for the Tahoe Palace, a proposed resort hotel at Stateline on the corner of Kahle and US HWY 50 for approval from the County Commissioners. The owner is Mr. Ted Jennings of Miller, South Dakota, the developer is Ernst & Ernst of New York and Chicago and Mr. Smith is the planner. This is a twenty acre site

and the ground coverage will be less than the maximum 50% coverage.

Mr. Smith showed several maps and an architect's rendering of the proposed complex. He also presented an Environmental Impact Report to the Commissioners for their files. The maps showed the proposed complex to be within the mile and is zoned Tourist Commercial.

Mr. Roland Adams, County Planner, stated the Planning Commission had approved this application with certain conditions. They were as follows:

That no permits be issued by Douglas County until all the listed conditions are met.

1. That the directives pointed out in the Environmental Information Report dated April 1973 shall be met.

2. That an Environmental Report in final form shall be supplied to the County for review and approval as outlined by the Tahoe Regional Planning Agency.

3. That the rights-of-way and improvements therein shall be constructed prior to the issuance of a certificate of occupancy. Such roads and right-of-way described shall be sufficient to meet the traffic and transportation requirements as depicted in the Environmental Information Report dated April 1973, Page 99, under paragraphs entitled *Transportation and Traffic Impact.* Calculations therein indicate a 25% increase in traffic should this hotel casino be constructed.

4. That the Landscaping shall be redesigned taking into consideration existing topography, tree cover and compliance with the objectives of Douglas County and the TRPA regulations and ordinances to

the satisfaction of the Public Works Director.

5. That the building exterior, color and type, be precisely determined.

6. That signing is not made a part of this Special Use Permit but will be considered independently at a later date upon application for same.

7. Any variation or change in the plan or report deemed substantial in nature would require this application to be reheard.

Mr. Adams stated his opinion is the major justification for a height variance in this area is the TRPA requirements do force applicants to go up with their confinement on land coverage. I do recommend that the requirements recommended by the Planning Commission be imposed on this applicant as they have been in other cases.

Mr. Meneley asked of Mr. Smith, in your Environmental Report you had figures that stated there would be more people moving to the Carson Valley, when most of these people have previously lived at the Lake. Why do you think there will be such an increase in population?

Mr. Smith answered in the last few years there has been a slowly increasing trend for people to live on the Nevada side, particularly in the Carson Valley. It's true that there is still a predominance of the population of the employees who live in California and work at Stateline. We would anticipate with the increasing availability of Kingsbury and the increasing desire by the various clubs to have their employees live in Nevada there will be an increasing tendency to be living in Nevada, whether at the Lake or down here.

Mr. Godecke made a motion to approve this application with the recommendations submitted by Mr. Roland Adams. Mr. Meneley seconded, motion unanimously carried.

Mr. Ray Smith submitted a Resolution, requesting the Commissioners adopt this Resolution as they had when Oliver Kahle's hotel was approved.

The Resolution read as follows:

The applications of Ted Jennings for the construction of a six hundred (600) room hotel at the intersection of HWY 50 and Kahle Boulevard in the Stateline area of Douglas County have been presented to the Board of County Commissioners of Douglas County and that body having considered the environmental and community impact effects upon the development of the Lake Tahoe Basin, said Commissioners do hereby find:

1. That the proposed project does not endanger the natural beauty and economic productivity of the Lake Tahoe Basin.

2. That it preserves the scenic beauty of the area and enhances the recreation opportunities of the region and does constitute an orderly development of the area.

3. That the said project is to be constructed on land which was zoned for the use and businesses to be conducted thereon, which was so designated in the finally adopted Master Plan of February 5, 1968.

4. That the project does conform to all of the ordinances of Douglas County and the Tahoe Regional Planning Agency, save and except as to the limitation on height

contained in Article 7.13 of the Land Use Ordinance of the Tahoe Regional Planning Agency, adopted February 10, 1972.

5. That pursuant to article 8.33 of the said Land Use Ordinance, it is recommended that the permit issuing authority issue a permit for the project for the heights as shown in the plans submitted because the said Board of County Commissioners has found that the maintenance and operation in his particular property is not detrimental to the health, safety, peace, morals, comfort and general welfare of persons residing or working in the neighborhood of the project and that the proposed project is not detrimental to or injurious to property or improvements in the neighborhood or to the general welfare of the region and will not cause any substantial, harmful environmental consequences on the land involved or on other lands or waters.

6. That it appears that the project will be of benefit to the general welfare of the region and will create substantial environmental benefits on the land involved and to other lands in the area.

The said Board of County Commissioners of Douglas County does also find that in connection with the greater height than is set out in Article 7.13, that: (1) provision has been made for protection from fire hazards and there is no need for protection against aviation accidents; (2) consideration has been given to the protection of view and to the character of the neighborhood; (3) proper provision has been made for light and air; and (4) such greater height will better promote protec-

tion of the environment of the area.

Mr. Godecke made a motion to adopt their resolution, Mr. Meneley seconded and motion unanimously carried.

. . .

RESOLUTION FOR BOARD OF COUNTY COMMISSIONERS OF DOUGLAS COUNTY RE: TAHOE PALACE

The applications of Ted Jennings for the construction of a six hundred (600) room hotel at the intersection of Highway 50 and Kahle Boulevard in the Stateline area of Douglas County have been presented to the Board of County Commissioners of Douglas County and that body having considered the environmental and community impact effects upon the development of the Lake Tahoe Basin, said Commissioners do hereby find:

1. That the proposed project does not endanger the natural beauty and economic productivity of the Lake Tahoe Basin.

2. That it preserves the scenic beauty of the area and enhances the recreation opportunities of the region and does constitute an orderly development of the area.

3. That the said project is to be constructed on land which was zoned for the use and businesses to be conducted thereon, which was so designated in the finally adopted Master Plan of February 5, 1968.

4. That the project does conform to all of the ordinances of Douglas County and the Tahoe Regional Planning Agency, save and except as to the limitation on height contained in Article 7.13 of the Land Use Ordinance of the Tahoe Regional Planning Agency, adopted February 10, 1972.

5. That pursuant to Article 8.33 of the said Land Use Ordinance, it is recommended that the permit issuing authority issue a permit for the project for the heights

as shown in the plans submitted because the said Board of County Commissioners has found that the maintenance and operation in his particular property is not detrimental to the health, safety, peace, morals, comfort and general welfare of persons residing or working in the neighborhood of the project and that the proposed project is not detrimental to or injurious to property or improvements in the neighborhood or to the general welfare of the region and will not cause any substantial, harmful environmental consequences on the land involved or on other lands or waters.

6. That it appears that the project will be of benefit to the general welfare of the region and will create substantial environmental benefits on the land involved and to other lands in the area.

The said Board of County Commissioners of Douglas County does also find that in connection with the greater height than is set out in Article 7.13, that: (1) provision has been made for protection from fire hazards and there is no need for protection against aviation accidents; (2) consideration has been given to the protection of view and to the character of the neighborhood; (3) proper provision has been made for light and air; and (4) such greater height will better promote protection of the environment of the area.

Chairman Harold P. Dayton, Jr.
Board of County Commissioners
Douglas County, Nevada

[MINUTES]
[HARVEY'S RESORT HOTEL]

DOUGLAS COUNTY BOARD OF COUNTY COMMISSIONERS

June 20, 1973

This regular meeting of the Douglas County Board of County Commissioners was held this day at 10:00 a.m. in the Commissioner's Room of the Douglas County Court House, Minden, Nevada. Present were Harold Dayton, Chairman, Charles Meneley and Roy Godecke, Commissioners. Also present were Darwin Ellis, Fire Chief, Earnhart Thran, County Clerk, Jim Rankin, Director of Public Works, Tom Eck, Deputy District Attorney, and Howard McKibben, District Attorney.

A list of general and salary claims were read and approved as further set forth in the Office of the County Auditor and Recorder.

. . .

IN THE MATTER OF HARVEY'S SPECIAL USE PERMIT—PUBLIC HEARING

Mr. Rankin read the Planning Commission recommendations to the Commissioners from the Minutes of the May 26, 1973 meeting. The recommendation was for approval of the Special Use Permit.

The following is the recommendation the Planning Commission stated must be met prior to the issuance of any other permits from Douglas County.

1. That the directives pointed out in the Environmental

Information Report (and any addendums made a part thereof) shall be met.

2. That an Environmental Information Report in final form shall be supplied to the County for review and approval as outlined by the TRPA.

3. That rights of way and improvements therein shall be constructed prior to the issuance of a certificate of occupancy. Such roads and rights of way described shall be sufficient to meet the traffic and transportation requirements as depicted in the Environmental Information Report dated April 26, 1973 and updated May 25, 1973.

4. That the parking lot shall be redesigned taking into consideration existing topography, tree cover and vegetation and landscaped areas provided throughout in compliance with the objectives of Douglas County and the TRPA regulations and ordinances to the satisfaction of the Public Works Director.

5. That the building exterior, color and type, be precisely determined.

6. That signing is not made a part of this Special Use Permit but will be considered independently at a later date upon application for same.

Mr. Dennis Small, representing Harvey's Resort Hotel and Ian MacKinley, architect and Mickey Laxalt, attorney for Harvey's were present at this meeting.

Mr. Meneley asked when this project was supposed to be started?

Mr. Small stated they planned on doing some of the work this fall. In the Environmental Report we have

proposed a storm water drainage treatment plant and we would like to start the excavation for that before winter.

Mr. Meneley asked if this was in conjunction with the other Clubs?

Mr. Small said this is not firmly tied down yet, and we would like to be prepared to do this on our own in case they decided to do something else, however we are prepared to build this storm water drainage treatment plant in conjunction with the other clubs if they should decide to go ahead with it.

Mr. Small stated this application for a Special Use Permit is the result of 23 months of study and is the best of six plans that we have reviewed. It will be approximately two years before the first phase of this project is completed and 10 years before the whole project is completed.

Roy Godecke made a motion to approve this Special Use Permit for Harvey's Resort Hotel subject to the restrictions imposed by the Planning Commission as outlined in their minutes and with one other restriction—there will be no building permit issued until the transportation problem plan is agreed to by the County Commissioners. Charles Meneley seconded the motion and motion unanimously carried.

Charles Meneley made a motion to adopt the following resolution:

RESOLUTION REGARDING HOTEL PROPOSALS PASSED AND APPROVED BY THE DOUGLAS COUNTY BOARD OF COUNTY COMMISSIONERS

WHEREAS, The Douglas County Commissioners heretofore approved Special Use Permits for the Park Tahoe, Tahoe Palace, Hotel Oliver, and Harvey's Hotels at Stateline, Nevada,

WHEREAS, some confusion has arisen as to the conditions under which the Special Use Permits have been granted,

NOW THEREFORE BE IT RESOLVED, that no building permits for any of the aforementioned hotel casinos will be issued until an adequate traffic plan for all of the said hotels approved by Douglas County is reviewed and approved by the Board of County Commissioners of Douglas County,

AND BE IT FURTHER RESOLVED THAT, no certificate of occupancy will be given to any of the aforementioned hotel casinos until said approved traffic plan is implemented and constructed and

BE IT FURTHER RESOLVED, that all of the conditions heretofore imposed by Douglas County relative to the approval of said Special Use Permits shall be upheld to remain in full force and effect.

Mr. Godecke seconded the motion and motion unanimously carried.

. . .

APPENDIX G

NEVADA REVISED STATUTES
277.207 and 278.027

277.207 "Priority for hearings in judicial actions, proceedings. All judicial actions and proceedings in which there may arise a question of the validity of any matter under the provisions of NRS 277.190 to 277.220, inclusive, shall be advanced as a matter of immediate public interest and concern, and be heard at the earliest practicable moment."

278.027 "Judicial relief, review of actions, decisions of governing bodies: Time for commencement. No action or proceeding shall be commenced for the purpose of seeking judicial relief or review from or with respect to any final action, decision or order of any governing body, commission or board granting or changing any land use classification or granting any special use or variance authorized by NRS 278.010 to 278.630, inclusive, unless such action or proceeding is commenced within 25 days from the date of filing of notice of such final action with the clerk or secretary of such governing body, commission or board."

APPENDIX H

In the
United States Court of Appeals
For the Seventh Circuit

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
and
PEOPLE OF THE STATE OF MICHIGAN,
Intervening Plaintiff-Appellee,
v.
CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Defendant-Appellants.

No. 77-2246

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 72-C-1253—John F. Grady, *Judge.*

ARGUED MAY 24, 1978—SUBMITTED AFTER SUPPLEMENTAL BRIEFING OCTOBER 12, 1978—DECIDED APRIL 26, 1979

Before FAIRCHILD, *Chief Judge,* TONE, *Circuit Judge,* and HARPER, *Senior District Judge.**

* The Honorable Roy W. Harper, Senior District Judge of the United States District Court for the Eastern and Western Districts of Missouri, is sitting by designation.

TONE, *Circuit Judge.* The State of Illinois filed this action under the federal common law of nuisance to enjoin the City of Milwaukee and the Sewerage Commissions of the City and County of Milwaukee [1] from discharging raw sewage and inadequately treated sewage into Lake Michigan.[2] Illinois alleged and undertook to prove at trial that the sewage contains pathogens, disease-causing viruses and bacteria, which are transported by currents into parts of the lake that lie within Illinois, where they present a substantial threat to the health of Illinois residents, and also that the sewage contains nutrients that accelerate eutrophication of the lake. The State of Michigan intervened as a plaintiff on the eutrophication issue only. After a four month trial, the district court found that plaintiffs had proved their allegations and entered a judgment requiring defend-

[1] For practical purposes, the two commissions may be regarded as one. *See also* n. 33, *infra.* The chief administrative officer for both is the same man; he also serves as the secretary for both commissions. The county commission has no employees other than the chief administrative officer and secretary referred to and uses the staff of the city commission when necessary. [Tr. 110–113.] In this opinion we differentiated between the two only when the difference is significant. [Record references in brackets are included in the slip opinion for the convenience of judges, counsel, and others who have access to the record but will be omitted from the opinion as it will appear in the Federal Second Reporter.]

[2] Illinois also named three other Wisconsin cities as defendants in this case: Kenosha, Racine, and South Milwaukee. They are not involved in this appeal.

After judgment was entered the County of Milwaukee moved to intervene as an indispensable party under Rule 19(b), Federal Rules of Civil Procedure (Fed. R. Civ. P.). The motion was denied; this court affirmed, without written opinion. The Supreme Court denied certiorari. 47 U.S.L.W. 3583 (1979).

ants to cease discharging raw sewage and to treat sewage before discharging it in compliance with effluent limitations more stringent than the minimum limitations imposed pursuant to the Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et seq.* Defendants appeal, raising the issues of (1) whether the relief available in an action based on the federal common law of nuisance is greater than that available under the federal statute, and (2) whether the evidence in this case is sufficient to support the relief granted. As to the first question, we hold that the statute does not limit the relief that may be granted; as to the second, we hold that the evidence is sufficient to support only some of the relief granted and therefore affirm in part and reverse in part.

This litigation began with Illinois' petition for leave to file an original action in the Supreme Court of the United States, which was denied, *Illinois v. Milwaukee,* 406 U.S. 91 (1972). Illinois then filed suit in the United States District Court for the Northern District of Illinois. Defendants' motions to dismiss for lack of *in personam* jurisdiction and improper venue were denied, *Illinois v. Milwaukee,* 4 E.R.C. 1849 (N.D.). Ill. 1972); later, defendants' motions to dismiss for failure to state a claim on which relief could be granted were also denied, *Illinois v. Milwaukee,* 366 F.Supp. 298 (N.D. Ill. 1973).

In due course the case proceeded to trial, at the conclusion of which the judge orally and extemporaneously announced his findings of fact and conclusions of law. The facts and the relief granted will be described later, as they become pertinent to the issues discussed.

Defendant-appellants' position is supported by the briefs of three *amica curiae:* the State of Wisconsin, the National League of Cities, and the United States Conference of Mayors. In addition, the United States has filed a brief *amicus curiae* in which it takes no position on the merits but supports the arguments of Illinois and Michigan that the federal common law of nuisance is not preempted or limited by federal legislation.

After oral argument this court ordered supplemental briefing addressed to (1) the elements required to be proved to establish a claim for a common law nuisance, (2) identification of particularized findings of the district court considered material to those elements and record references to the evidences supporting those findings, and (3) identification of evidence in the record supporting the reasonableness and necessity of the relief granted by the trial court. The parties filed extensive supplemental briefs, and each side subsequently filed a reply to the other's supplemental brief, as a consequence of which submission of the case was delayed until October 1978.

I.

Objections to the Forum

Defendants raise three arguments that may be broadly characterized as objections to the forum. First, defendants contend that they have committed no "tortious act within" the State of Illinois as that phrase is used in the Illinois "long-arm" statute, § 17 of the Illinois Civil Practice Act, Ill. Rev. Stat. ch. 110, § 17 (1977), and

therefore service of process was ineffective and the United States District Court sitting in Illinois could not exercise personal jurisdiction over them. *See* Rule 4(e), Federal Rules of Civil Procedure (Fed. R. Civ. P.). Second, defendants contend that their contacts with Illinois are insufficient to meet the minimum required by *International Shoe v. Washington,* 326 U.S. 310 (1945). Third, defendants contend that even if the court had personal jurisdiction, venue was improper. Judge Bauer, then a district judge, rejected these contentions in denying defendants pretrial motions to dismiss in *Illinois v. Milwaukee, supra,* 4 E.R.C. at 1850, and we do likewise.

For purposes of § 17 "a tort is committed in the place where the injury occurs." *McBreen v. Beech Aircraft Corp.,* 543 F.2d 26, 28 (7th Cir. 1976). It seems beyond dispute that injury to the plaintiff in this case occurred in Illinois. *Cf. Ohio v. Wyandotte Chemicals Corp.,* 401 U.S. 493, 500 (1971).

As to the second contention, the critical issue is whether it is fair and reasonable to require the defendants to defend in Illinois. *See Kulko v. Superior Court of California,* 436 U.S. 84, 92 (1978); *Telco Leasing, Inc. v. Marshall County Hospital,* 586 F.2d 49 (7th Cir. 1978).[3] Each year defendants dump into Lake Michigan mil-

[3] If Congress had chosen to authorize nationwide service of process, no minimum contacts issue would be raised. *See, e.g., Fitzsimmons v. Barton,* 589 F.2d 330, 333 (7th Cir. 1979); *Mariash v. Morill,* 496 F.2d 1138, 1143 & n. 6 (2d Cir. 1974). Congress has not done so and Fed. R. Civ. P. 4(e) makes jurisdiction dependent on the long-arm statute or rule of court of the state in which the district court is held; therefore we are required to determine whether defendants' contacts with Illinois are sufficient to support the exercise of *in personam* jurisdiction.

lions of gallons of pathogen-containing sewage, which the district court found is sometimes carried into Illinois waters and presents a substantial threat of harm to Illinois residents. Under such circumstances, we do not think it unfair or unreasonable to require the defendants to defend their conduct in a federal forum located within the State of Illinois. *See Ohio v. Wyandotte Chemicals Corp., supra,* 401 U.S. at 500.

Defendants argue that venue was improper for three different reasons: (1) the venue provision of the Federal Water Pollution Control Act Amendments of 1972, P.L. 92-500, 86 Stat. 816, requires that the suit be filed in the district where the source is located, (2) all "nuisance" actions are "local" and therefore must be filed in the district where the source is located, and (3) all actions against a municipal corporation are "local" and therefore must be filed in the district where the municipal corporation is located. The first argument is quickly disposed of, for the venue provision of the statute is by its terms inapplicable. That provision is relevant only to "action[s] respecting a violation . . . of an effluent standard or limitation . . . brought under [§ 505] . . . ." § 505(c)(1). Here, plaintiff's action is based on the federal common law of nuisance. Therefore the relevant venue provision is 28 U.S.C. § 1391(b), which permits suit in either the "judicial district where all defendants reside, or in which the claim arose . . . ." *Illinois v. Milwaukee, supra,* 406 U.S. at 108 n.10.

Whatever may be the significance of state law in determining whether an action is "transitory" or "local" in

other contexts,[4] we agree with the district court, *Illinois v. Milwaukee, supra,* 4 E.R.C. at 1850, that the language in the Supreme Court's opinion in *Illinois v. Milwaukee, supra,* 406 U.S. at 108 n.10, indicates that an action against a municipal corporation and based on the federal common law of nuisance may be filed, pursuant to 28 U.S.C. § 1391(b), in either the district where all the defendants reside or the district where the claim arose, without regard to any otherwise applicable state venue statutes or common law rules. In this case, the claim arose in the Northern District of Illinois, where the injury was suffered, and therefore venue was proper.[5]

II.

Effect of Federal Statutes on Federal Common Law of Nuisance

In *Illinois v. Milwaukee, supra,* 406 U.S. 91, the Court

[4] *See, e.g., French v. Clinchfield Coal Company,* 407 F.Supp. 13, 16–17 n. 11 (D.Del. 1976) (Caleb Wright, J.): *Hasburgh v. Executive Aircraft Company,* 35 F.R.D. 354, 355 (W.D.Mo. 1964); *see generally* 1 *Moore's Federal Practice* § 0.142 [2.—1], 1368–1369 & nn. 40–41 (1978); Wright, *Law of Federal Courts* 158 (2d ed. 1970); Wright, Miller & Cooper, 15 *Federal Practice and Procedure* § 3822 (1976).

[5] There is some debate as to whether there ought to be a uniform rule of law in federal courts governing the question of whether an action is "local" or "transitory." *See, e.g., French v. Clinchfield, supra,* 407 F.Supp. at 16–17 n. 11; Wright, Miller & Cooper, *supra,* § 3822 at 129–130; 1 *Moore's Federal Practice, supra,* at 1368–1369 & n. 40. *Illinois v. Milwaukee, supra.* 406 U.S. 108 n. 10, can also be understood as resolving this debate in favor of a uniform federal rule, at least in federal common law nuisance actions, and as indicating that such actions should be treated as "transitory." Under either interpretation of the language, § 1391(b) is applicable and venue was proper.

denied Illinois' petition for leave to file an original action under 28 U.S.C. § 1251(a)(1),[6] on the ground that "States," as used in that provision, does not include political subdivisions, *Id.* at 98. The Court also declined to exercise its jurisdiction under 28 U.S.C. § 1251(b)(3),[7] since the issues raised in the complaint were governed by federal common law, and therefore an appropriate district court would have jurisdiction of the case under 28 U.S.C. § 1331(a).[8] After reviewing the provisions of the Federal Water Pollution Control Act, 62 Stat. 1155,[9] and other federal legislation regulating pollution of interstate waters, the Court held that federal common law had not been preempted, but noted "that new federal laws and new federal regulations may in time preempt the field of federal common law of nuisance." *Id.* at 107. Shortly after that decision Congress adopted the comprehensive Federal Water Pollution Control Act Amendments of 1972, P.L. 92-500, 86 Stat. 816. In 1977 Congress further amended the Act. P.L. 95-217, 91 Stat. 1566. Defendants concede that neither the 1972 nor the

[6] That provision states,

> The Supreme Court shall have original and exclusive jurisdiction of: (1) All controversies between two or more States; . . . .

[7] That provision states,

> The Supreme Court shall have original but not exclusive jurisdiction of: . . . (3) All actions . . . by a State against the citizens of another State . . . .

[8] That provision states,

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy . . . arises under the . . . laws . . . of the United States . . . .

[9] For the provisions of the statute as amended at the time of the Court's decision *see* 33 U.S.C. § 1151 *et seq.* (1970).

1977 amendments preempt the federal common law of nuisance. Wisconsin's brief *amicus curiae,* however, argues that the comprehensive statutory scheme preempts the common law. The brief of the United States as *amicus curiae* argues to the contrary. Since the issue concerns our jurisdiction, we are obliged to consider it. *See, e.g., American Meat Institute v. EPA,* 526 F.2d 442, 448–449 (7th Cir. 1975). In addition, we consider whether the statute, even if it does not preempt the federal common law, limits the relief that may appropriately be granted or otherwise influences the principles to be applied in this action.

A. *Federal Water Pollution Control Act*

1. *The Statute Before 1972*

The pre-1972 Federal Water Pollution Control Act, 62 Stat. 1155, as amended, 33 U.S.C. 1151, *et seq.* (1970), authorized each state, with the approval of the Secretary of the Interior, to adopt "water quality criteria applicable to interstate waters or portions thereof within" the state, 33 U.S.C. § 1160(c)(1) (1970), for the purposes of protecting the public health or welfare and enhancing the quality of water, *see* 33 U.S.C. § 1160(c)(3) (1970). If any state failed to adopt acceptable water quality criteria, the Act authorized the Secretary of the Interior to prescribe them, 33 U.S.C. § 1160(c)(2) (1970); water quality standards prescribed by the Secretary were subject to modification after review by a "Hearing Board" on petition of the governor of any state affected by the standards, 33 U.S.C. § 1160(c)(4) (1970). The Act also provided enforcement procedures, recent-

ly described by the Supreme Court as "cumbrous." *EPA v. California ex rel. State Water Resources Control Board* 426 U.S. 200, 202 (1976); *see also Illinois v. Milwaukee, supra,* 406 U.S. at 103 (describing the enforcement procedures as "long" and "drawn-out").

The procedures for abating pollution originating in one state but allegedly causing harm in a second state are of primary importance for our purposes. The Act provided that upon complaint of the governor or water pollution control agency of the second state, the Secretary should call a conference, giving all the interested parties notice of, and an opportunity to make statements at, the conference, 33 U.S.C. § 1160(d)(1), (3) (1970). After the conference, the Secretary was directed to prepare a report for the benefit of the state agencies represented at the conference in which he summarized the proceedings and discussed, among other things, the adequacy of the measures taken to abate the pollution. 33 U.S.C. § 1160(d)(4) (1970). If the measures already taken were deemed inadequate, the Secretary was to recommend appropriate remedial action to the water pollution agency in the state from which the pollution came. 33 U.S.C. § 1160(e) (1970). If after "at least six months" the state agency had not taken the necessary action, the Secretary was directed to conduct hearings at which all the interested parties would again be given an opportunity to make statements this time before a "Hearing Board." 33 U.S.C. § 1160(f)(1) (1970). If the Hearing Board found that pollution endangering the public health or welfare was indeed occurring and that

adequate steps toward abatement had not been taken, it submitted its findings and recommendations "concerning the measures, if any, which it [found] to be reasonable and equitable to secure abatement of such pollution." *Id.* The Secretary then forwarded the Hearing Board's findings and recommendations "together with a notice specifying a reasonable time (not less than six months) to secure abatement of such pollution" to the polluters and the originating state's water pollution control agency. *Id.* If the polluter or state agency failed to take "action reasonably calculated to secure abatement" within the specified time, then the Secretary was authorized to request the Attorney General to file suit to secure abatement. 33 U.S.C. § 1160(g)(1) (1970). Discharges that reduced the quality of water below any "water quality criteria" established under the Act were subject to abatement pursuant to similar procedure. 33 U.S.C. § 1160(c)(5) (1970) The Act made no provision for private abatement suits.

It is this system of interstate water pollution abatement, in combination with the discharge permit system administered by the Army Corps of Engineers, see note 16, *infra,* and other federal legislation, that the Court found insufficient to preempt the federal common law of interstate water pollution in *Illinois v. Milwaukee, supra,* 406 U.S. at 101-103, 107.

2. *The 1972 Act*

Because of the inadequacies inherent in the "water quality" approach and, among other things, the ineffectiveness of the enforcement procedures described

above,[10] Congress adopted the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251, *et seq.* The 1972 amendments, which we sometimes refer to herein as the Act or FWPCA, substantially rewrote the statute, supplementing the water quality criteria with direct discharge limitations and greatly strengthening enforcement procedures. Congress declared that the national goal was to eliminate the discharge of pollutants into navigable waters by 1985. To achieve that goal, Congress established general technology-based levels of treatment for any pollutant that is to be discharged into navigable waters and specified dates by which those levels of treatment are to be achieved, § 301;[11] all point sources [12] except publicly owned treatment works [13]

[10] *See* S.Rep. No. 92-414, reprinted in [1972] *U.S. Code Cong. & Ad. News* 3668, 3671–3674 (1972); *see also* Note. "Federal Common Law in Interstate Water Pollution Disputes," 1973 *U. Ill. L. F.* 141, 143–144 & nn. 12–14.

[11] Sections of the 1972 Act (P.L. 92-500, 86 Stat. 816) are referred to in this opinion by their designations in the Statutes at Large. The parallel United States Code citations for the sections to which reference is made are as follows:

Section 101	—	33 U.S.C. § 1251
Section 201	—	33 U.S.C. § 1281
Section 212	—	33 U.S.C. § 1292
Section 301	—	33 U.S.C. § 1311
Section 304	—	33 U.S.C. § 1314
Section 309	—	33 U.S.C. § 1319
Section 402	—	33 U.S.C. § 1342
Section 502	—	33 U.S.C. § 1362
Section 505	—	33 U.S.C. § 1365
Section 510	—	33 U.S.C. § 1370
Section 511	—	33 U.S.C. § 1371

[12] "Point source" is defined as "any discernible, confined and discrete conveyance, . . . from which pollutants are or may be discharged." § 502(14).

[13] For purposes of "Title II—Grants for Construction of Treatment Works," treatment works are defined as "any devices and systems used in the storage, treatment, recycling, and reclamation of municipal sewage or industrial wastes of a liquid nature to implement section 201 of this Act [which is designed to encourage the development of the "best practicable waste treatment" over the life of the treatment work] . . . . [and] any

must adopt the "best practicable control technology currently available" by July 1, 1977, and the "best available technology economically achievable" by July 1, 1983, §§ 301(b)(1)(A), (2)(A); publicly owned treatment works are required to adopt "secondary treatment" by July 1, 1977 and "the best practicable waste treatment over the life of the [treatment]works" by July 1, 1983, §§ 301(b)(1)(B), (2)(B), and 201(g)(2)(A). The Act directs the Administrator of the Environmental Protection Agency (EPA)[14] to prescribe the specific effluent limitations achievable using "best practicable" treatment technology, §§ 301(b)(1)(A), 304(b)(1), "best available" treatment technology, §§ 301(b)(2)(A), 304(b)(2), and "secondary" treatment technology, §§ 301(b)(1)(B), 304(d)(1). *See, e.g., E.I. du Pont de Nemours & Co. v. Train,* 430 U.S. 112, 126–136 (1977); *American Meat Institute v. EPA, supra,* 526 F.2d at 448–452. In addition, all point sources, presumably including publicly owned treatment works, must comply with "any more stringent limitation . . . established

other method or system for preventing, abating, reducing, storing, treating, separating, or disposing of municipal waste, including storm water runoff, or industrial waste, including waste in combined storm water and sanitary sewer systems." §§ 212(2)(A), (B). Although "treatment works" is not defined for purposes of "Title III—Standards and Enforcement," the definitions provided in § 212 provide an indication of what may have been intended. We recently noted that "[a]n earlier specific definition may properly color a subsequent use of the same words without redefinition," quoting from *Kent Mfg. Corp. v. Commissioner,* 288 F.2d 812, 815 (4th Cir. 1961). *Nachman Corp. v. Pension Benefit Guaranty Corp.,* . . . F.2d . . ., . . . n. 6 (7th Cir. 1979).

[14] "EPA" in this opinion includes the administrator and the agency.

pursuant to any state law or regulations (under authority preserved by § 510)[15] or any other Federal law or regulations . . . ." § 301(b)(1)(C).

The 1972 Act also created a permit system, called the National Pollutant Discharge Elimination System (NPDES), under which discharge permits may be granted by EPA or, where a state provides satisfactory assurances that it will enforce the requirements of the Act and EPA regulations, a designated agency of the state.[16] Any discharges, except in compliance with the limitations imposed in a permit, are declared unlawful. § 301(a). A permit must require the discharger to meet the minimum effluent limitations prescribed in the Act and EPA regulations. § 402(b)(1)(A).

Each state agency established under the National Pollutant Discharge Elimination System is required to noti-

[15] Section 510 provides,

> Except as expressly provided . . . nothing in this Act shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard prohibition, pretreatment standard, or standard of performance is in effect under this Act, such State or political subdivision or interstate agency may not adopt or enforce any . . . less stringent . . . effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard or standard of performance . . .; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to waters . . . of such States.

[16] This system replaced the permit system formerly administered by the Army Corps of Engineers under the Act of 1899, 30 Stat. 1152, 33 U.S.C. § 407, *United States Steel Corp. v. Train,* 526 F.2d 822, 831 & n. 7 (7th Cir. 1977); *American Meat Institute v. EPA, supra,* 556 F.2d at 446.

fy EPA of any permit to be issued under the program. § 402(d)(1). If, under the permit, the waters of another state "may be affected," the agency is required to notify the other state, to give the other state an opportunity to submit written recommendations concerning the limitations to be imposed in the permit, and, if those recommendations are not adopted, to explain why in writing to EPA and the other state. §§ 402(b)(3), (5).

EPA may veto the issuance of any discharge permit if the waters of a state other than the issuing state may be affected. §§ 402(d)(2)(A), (b)(5). It is not clear whether the veto can be based on a ground other than violation of a standard imposed pursuant to the Act by EPA or a state. The language of § 402(d)(2)(A) suggests that it can.[17] The legislative history, however, indicates that the veto must be based upon the issuing state's failure to impose limitations sufficient to assure that ap-

[17] Section 402(d)(2) provides that,

> No permit shall issue (A) if the Administrator within ninety days of his notification under subsection (b)(5) of [402] objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act.

Comparison of §§ 402(d)(2)(A) and (B) suggest that, although vetoes must usually be based on a violation of the effluent limitations imposed under the Act, there is no such requirement where the interests of a second state are involved. *But cf.* § 505(h) (authorizing governor's suit against Administrator of EPA, but only for failure to enforce effluent limitations imposed under the Act against a point source in another state resulting in harm to waters in governor's state) quoted in note 19, *infra; see also* § 505(a) (citizens' suits to enforce limitations imposed under the Act).

plicable effluent limitations, either those imposed under the Act by EPA or those imposed by the affected state, are respected.[18] Since there has been no veto here, it is unnecessary for us to resolve this ambiguity.

[18] The Administrator's general veto authority is expressly limited to cases in which the minimum limitations imposed under the Act are violated. § 402(d)(2)(B). The Senate version of the Act, S. 2770, provided that no permit could be issued by any state agency "until the Administrator is satisfied that the conditions imposed by the State meet the requirements of this Act." S. 2770, 92d Cong., 1st Sess. § 402(d)(2) (1971), reprinted in 117 Cong. Rec. 38865, 38883 (1971); Library of Congress. *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 1534, 1690 (1973). The House version of the Act, H.R. 11896, specifically rejected the permit-by-permit review approach S. 2770 and only authorized the Administrator to veto those permits under which the waters of a second state might be affected. H.R. 11896, 92d. Cong., 2d Sess. § 402(d)(2) (1972), reprinted in 118 Cong. Rec. 10804, 10824 (1972); 1 *Legis. Hist., supra*, 893, 1058–1059. In part, the Act incorporates the provisions of both S. 2770 and H.R. 11896. *See* note 17, *supra*.

The House provision was intended as a state-permit analogue to the provisions of H.R. 11896, *supra*, § 401, which requires every applicant for a federal license to secure a statement from the appropriate state to the effect that no applicable effluent limitation will be violated by the activity for which the license is sought. *See* H.R. Rep. No. 92-911, 92d Cong. 2d Sess., reprinted in *Legis. Hist., supra*, 753, 808–814. Concerning H.R. 11896, § 402(d)(2), the House Committee explained:

> The committee has included this procedure to protect States which might otherwise be affected by the issuance of a permit in a second State. This is similar to the safeguards given to States in the certification procedure under section 401.

The 1972 Act also substantially modified enforcement procedures. "Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation" imposed under the Act, including those contained in state-issued discharge permits, he may at his option "issue an order requiring such person to comply," commence a civil action for appropriate relief in a federal district court, or notify the appropriate state agency of the violation. §§ 309(a)(1), (3), (b). If the latter course is chosen and after 30 days the state agency has not taken appropriate action to secure compliance, the Administrator must exercise one of the first two options. § 309(a). Criminal and civil penalties are provided in §§ 309(c) and (d).

In accord with the stated policy of encouraging "[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established" under the Act, § 101(e), Congress authorized any "person . . . having

However, since permits granted by States under section 402 are not Federal permits—but State permits—the certification procedures are not applicable.

Id. at 814. As noted above the House specifically rejected the permit-by-permit review approach of the Senate bill, in favor of giving the individual states "maximum responsibility for the permit program." *See id. See also* the discussion of the 1977 amendments to the veto provisions, *infra*.

For more detailed discussions of the legislative history of the veto provisions see *Save the Bay v. Administrator of the Environmental Protection Agency*, 556 F.2d 1282, 1284–1287 (5th Cir. 1977); *Mianus River Preservation Committee v. Administrator of EPA*, 541 F.2d 899, 906–909 (2d Cir. 1976).

an interest which is or may be affected" to file a civil action to secure compliance with the Act against any person alleged to be in violation of the provisions of the Act or against the Administrator if he fails to perform any nondiscretionary duty under the Act. §§ 505(a), (g).[19] But "[n]othing in [§ 505] shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)." § 505(e).

3. *The 1977 Amendments.*[20]

The 1977 amendments are fairly extensive, but of limited significance for our purposes. In them Congress modified the National Pollutant Discharge Elimination System to provide that when EPA objects to the issuance of a permit, it must also state "the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator," § 65(b), 91 Stat. 1599, as amended, 33 U.S.C.A. § 1342(d)(2). A procedure was provided to avoid the impasse that had been possible under the 1972 Act when EPA objected to the issuance of a specific permit but the state agency refused to issue a modified permit; under the amendments, if EPA "objects to the

[19] Also, the governor of a state may file a civil action against the Administrator "where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this Act the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State." § 505(h).

[20] Clean Water Act of 1977, P.L. 95-217, 91 Stat. 1566 (to be codified 33 U.S.C. §§ 1251 *et seq.*).

issuance of a permit," the issuing state is entitled to a public hearing on the objection. § 65(a), 91 Stat. 1599, as amended, 33 U.S.C.A. § 1342(d)(4); *see* S. Rep. No. 95-370, 95th Cong., 1st Sess. 73, reprinted in [1977] *U.S. Code Cong. & Ad. News* 4326, 4398; H.R. Rep. No. 95-830, 95th Cong., 1st Sess. 96–97, reprinted in [1977] *U.S. Code Cong. & Ad. News* 4424, 4471–4472. If the state either fails to request a hearing within 90 days of the objection or fails to submit a revised permit meeting the objection, then EPA may issue a permit itself "in accordance with the guidelines and requirements" of the Act § 65(a), *supra.*

Congress also adopted provisions authorizing EPA, with the concurrence of the State in which the point source is located, under limited circumstances, to modify the dates by which the effluent levels established in the 1972 Act for all point sources must be met. *See* §§ 43, 44, 45, 91 Stat. 1583–1586, as amended, 33 U.S.C.A. §§ 1311(g), (h), (i). The provisions applicable to modification of compliance dates for publicly owned treatment works are of particular significance here. Where construction is necessary for compliance with the "secondary treatment" or "more stringent" requirements of the 1972 Act, §§ 301(b)(1)(B), (C), but cannot be completed in time to meet these requirements or "the United States has failed to make financial assistance . . . available in time to achieve such limitations . . .," EPA or the appropriate state agency may extend the compliance date to July 1, 1983. § 45, 91 Stat. 1584–1585, as amended, 33 U.S.C.A. § 1311(i). The language and legislative history of this provision, however, make it clear

that the maximum compliance possible at the time must be achieved throughout the period and complete compliance achieved at the "earliest date practically possible." *Id.;* S. Rep. No. 95-370, 95th Cong., 1st Sess. 47, reprinted in [1977] *U.S. Code Cong. & Ad. News* at 4372. The 1977 amendments also provide for pollutant-specific modifications of the requirements of the 1972 Act. § 44, 91 Stat. 1584, as amended, 33 U.S.C.A. § 1311(h). Upon an adequate showing that, among other things, "there is an applicable water quality standard specific to the pollutant for which the modification is requested" and the modification would "not interfere with the attainment or maintenance of that water quality which assures protection of public water supplies and the protection . . . of a balanced . . . population of shellfish, fish, and wildlife, and allows recreational activities, in or on the water . . .," EPA, "with the concurrence of the State, may issue a permit . . . which modifies the secondary treatment effluent limitations prescribed under the Act for publicly owned treatment works." *Id.*

The only other provision of the 1977 amendments that is of significance for our purposes directs EPA to conduct a study and report to Congress on "the status of combined sewer overflows in municipal treatment works operations." § 70, 91 Stat. 1608, as amended, 33 U.S.C.A. § 1375(c). The Senate committee studying the proposed legislation noted that "the second largest category of municipal needs identified in the 1976 National needs list is the correction of combined sewer overflows . . . . Examples brought to the committee's attention showed combined sewer overflow problems to be a sig-

nificant source of untreated sewage to the Nation's waters." S. Rep. No. 95-370, *supra,* 81, reprinted in [1977] *U.S. Code Cong. & Ad. News, supra,* 4406. One of the purposes of the report is to determine whether new legislation to address the problem is needed. § 70, 91 Stat. 1608, as amended, 33 U.S.C.A. § 1375(c).

B. *Preemption and Compliance with the Statute As a Defense*

Congress has thus established a comprehensive and detailed system for the regulation and eventual elimination of pollutant discharges into the nation's waters. Nevertheless, Congress has expressly stated that the effluent limitations imposed under the Act do not preclude the establishment of more stringent limitations by any state, § 510, *see United States Steel Corp. v. Train, supra,* 556 F.2d at 835–836, 837–838; and nothing in the Act is to be construed as "limiting the authority of any officer or agency of the United States under any other law or regulation not inconsistent with [the] Act; . . . ." § 511(a). The language of § 511(a) is arguably broad enough to include the federal courts and, when read in the light of § 510, suggests, if it does not require, the conclusion that Congress did not intend to preempt the federal common law of nuisance. The imposition of effluent limitations more stringent than those required under the Act, if necessary to prevent harm to a complaining party, is fully consistent with the provisions of the Act. Because of the shared authority between the federal government and the individual states established in the Act, it is plain that uniformity was not

thought necessary. Even the minimum effluent limitations prescribed in the Act are not uniform because the provisions for the ad hoc modification of the degree of compliance required for specific point sources will necessarily lead to variation.

While providing in § 505 for private suits to enforce the effluent limitations prescribed in the Act, Congress specifically stated that nothing in the section "shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief . . .," thus indicating that preemption of existing remedies was not intended. There is nothing in the phrase "any statute or common law" that suggests that this provision is limited to state common law. There is no reason to believe that Congress would have wished to preserve state common law claims and preclude federal common law claims. The preservation of all existing remedies is consistent with the recognition in this Act of the value of public participation in all aspects of the effort "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," exemplified by the direction to EPA and states participating in the national discharge permit system to encourage such participation. *See also Citizens for a Better Environment v. EPA,* . . . F.2d . . ., . . . (7th Cir. 1979). We conclude that the federal common law of nuisance has not been preempted by the Act.

For the same reasons, we reject defendants' contention that compliance with a discharge permit issued under the Act is a defense in an action based on the federal

common law of nuisance. *Cf. New York v. New Jersey,* 256 U.S. 296, 308 (1921) (in which the Court noted a construction permit issued by the Secretary of War, presumably under the provisions of the Rivers and Harbors Act of 1899 that were replaced by § 402 of the 1972 Act, see note 16, *supra,* incorporating discharge limitations adopted in a settlement agreement with United States but did not regard the limitations as dispositive in New York's action against New Jersey); *Baltimore & Potomac R. Co. v. Fifth Baptist Church,* 108 U.S. 317 (1883) (rejecting the defendant railroad's arguments that compliance with District of Columbia smoke stack regulations, the existence of a federal charter authorizing defendants to "make and construct all works whatever which might be necessary and expedient," or congressional approval of the train route constituted a defense in a nuisance action when plaintiff suffered injury resulting from defendant's activity).[21] *But compare Pennsylvania*

[21] The law of Wisconsin is in accord. *See, e.g., Winchell v. Waukesha,* 110 Wis. 101, 109, 85 N.W. 668, 670 (1901) ("The great weight of authority, American and English, supports the view that legislative authority to install a sewer system carries no implication of authority to create or maintain a nuisance. . . . If such nuisance be created, the same remedies may be invoked as if the perpetrator were an individual."); *Costas v. City of Fond du Lac,* 24 Wis. 2d 409, 415–416, 129 N.W.2d 217, 220–221 (1964) (operation of sewage plant in accord with state specifications, orders, and regulations is no defense in nuisance action). For other state cases to the same effect, *see, e.g., People of the State of California v. Los Angeles,* 160 Cal. App. 2d 494, 505–506, 325 P.2d 639, 645 (Ct. App. 1958); cases cited in Annotation, "Sewage Disposal Plant as Nuisance," 40 ALR 2d 1177, 1182–1186 (1955), Later Case Service, 40 ALR 2d 77, 77 (1969), Later Case Service Supp. 42, 42 (1978); cases cited in Annotation, "Right to, and Propriety of Injunction Against Nuisance for Discharge of City Sewage," 77 L.Ed. 1213, 1227–1231 (1933); cases cited in Davis, "Theories of Water Pollution Litigation," 1971 Wis. L. Rev. 738, 768 n. 138, 771 n. 148 (1971); *cf. Venuto v. Owens Corning Fiberglass,* 22 Cal. App. 3d 116, 128–129, 99 Cal. Rptr. 350, 358–359 (1971) (air pollution).

v. Wheeling & Belmont Bridge Co., 13 How. (54 U.S.) 518 (1851) *with Pennsylvania v. Wheeling Bridge Co.,* 18 How. (59 U.S.) 421 (1856) *and Northern Transportation Co. v. Chicago,* 9 Otto (99 U.S. 635) (1879).

C. *Limitations on Relief*

Defendants contend that even if the Act does not preempt the federal common law of nuisance, and even if compliance with the Act is not a defense, no more stringent relief can be granted by way of abatement than the federal minimum prescribed by the Act and EPA. In other words, although the federal government need not speak with a single voice, the words must be the same. As noted above, however, Congress has expressly stated that nothing in the Act should be read to limit the authority of any federal "officer or agency" so long as that authority is consistent with the provisions of the Act. Consistency does not require uniformity; the provision expressly preserving the authority of the states to impose limitations more stringent than those required under the Act, § 510, indicates that Congress did not think more stringent limitations inconsistent with the Act. Moreover, the savings clause, § 505(e), speaks not only of rights, but also of remedies. Since any effluent limitations less stringent than those provided in the Act, except pursuant to the modification procedures established, are prohibited, § 505(e) must contemplate more stringent limitations than those imposed in the Act. If accepted, defendants' argument would reduce a cause of action under the federal common law to no more than an alternative avenue for enforcement of the

statute. For the reasons stated above, we do not think that Congress intended any such restriction or that the statute, fairly read, limits the relief available in a federal court.

D. *Common Law of the Statute*

The conclusion that the Federal Water Pollution Control Act, as amended, does not preempt the federal common law of nuisance or limit the relief available in this case does not render that Act irrelevant. A statute that does not by its terms govern the case before a court may contain indications of the legislature's judgment on relevant issues of policy or provide an appropriate principle for decision of the case.[22] In applying the federal common law of nuisance in a water pollution case, a court should not ignore the Act but should look to its policies and principles for guidance. *See Illinois v. Milwaukee, supra,* 406 U.S. at 103 n.5; *cf. Textile Workers v. Lincoln Mills,* 353 U.S. 448, 456–457 (1957).

The Act contains no rules or principles that control in this case. We think, however, that the minimum treatment standards found acceptable by Congress and the effluent limitations imposed under the system established in the Act provide an appropriate starting point.

[22] *See, e.g., Moragne v. States Marine Lines,* 398 U.S. 375, 390–393, 406–408 (1970); Landis, "Statutes and the Sources of Law," *Harvard Legal Essays* 213 (1934), reprinted in *2 Harv. J. Legis.* 7, 12–19, 21–22 (1965); Page, "Statutes as Common Law Principles," 1944 *Wis. L. Rev.* 175, 186–211; Schaefer, "Precedent and Policy," 34 *U. Chi. L. Rev.* 3, 20–22 (1966); Stone, "The Common Law in the United States," 50 *Harv. L. Rev.* 4, 14–15 (1936); Traynor, "Statutes Revolving in Common-Law Orbits," 17 *Cath. U. L. Rev.* 401, 403–408, 412–417, 421–424 (1968).

Cf., e.g., Wallis v. Pan American Petroleum, 384 U.S. 63, 69 (1966). In the 1972 Act, Congress said that by July 1, 1977, publicly owned treatment works must, with several significant exceptions, adopt "secondary" treatment. That command was qualified by the 1977 amendments authorizing EPA or the appropriate state agency to extend the time for compliance with the secondary treatment standard to July 1, 1983. The Act's generally more stringent second stage provisions only require "the application of the best practicable waste treatment technology *over the life of the works* . . .," by July 1, 1983, §§ 301 (b) (2) (B), 201 (g) (2) (A) (emphasis added). Thus, Congress has approved secondary treatment as an acceptable minimum for publicly owned treatment works at least until 1983 and perhaps later.[23]

[23] Comparison of the treatment levels demanded of publicly owned treatment works and those demanded of all other point sources suggests that Congress was of the view that publicly owned treatment works should be subject to less stringent standards than other point sources. Point sources other than publicly owned treatment works were required to implement the "best practicable control technology currently available," as determined by EPA, by July 1, 1977, § 301 (b) (1) (A). Senator Muskie, the "principal author of the Act," *see American Meat Institute v. EPA, supra,* 526 F.2d at 451, expressed the view that although EPA had authority to define "best practicable" as "the equivalent of secondary treatment for industry," more stringent requirements might also be imposed, 1 *Legislative History of the Water Pollution Control Act Amendments of 1972* 167–170 (1973), quoted in *American Meat Institute v. EPA, supra,* 526 F.2d at 453. The 1972 Act required point sources other than publicly owned treatment works to implement "best available treatment" by 1983, § 301 (b) (2) (A); the 1977 amendments modified this provision to require "best conventional treatment" for pollutants identified by EPA as "conventional" by July 1, 1984, and "best available treatment" for other pollutants, no later than July 1, 1987, § 42, 91 Stat. 1582–1583, as amended, 33 U.S.C.A. §§ 1311 (b) (2) (A), (E), (F).

EPA has defined secondary treatment for the purposes of the Act in terms of resulting effluent quality, 40 C.F.R. § 133.102. Even though states are authorized to establish more stringent effluent limitations than those required by EPA, §§ 402, 510, there appear to be no Wisconsin regulations imposing more stringent standards, and the NPDES permits issued by the Wisconsin agency to the defendants in this case impose limitations no more stringent than those required by EPA.[24]

As we shall explain in more detail below, the effluent limitations contained in the permits are less stringent than those imposed by the district court in this case. In addition, the permits contain no prohibitions against discharges of raw sewage through overflows.

While is is appropriate to give weight to Congress' expectations in adopting the Act and the standards established by EPA pursuant to the Act, we cannot forget that Congress deliberately chose to reserve existing rights and remedies. Thus, if the evidence in this case shows that requirements more stringent than those imposed in the NPDES permits are necessary to protect Illinois residents from harm caused or threatened by the defendants' sewage discharges, plaintiffs are entitled to have the more stringent requirements imposed. We can

[24] EPA has not vetoed the permits issued by the Wisconsin agency. *See* notes 17 and 18, *supra,* and accompanying text. Before filing this action, Illinois invoked the enforcement procedures of the pre-1972 Act, *see,* Note, "Federal Common Law in Interstate Disputes," *supra,* 1973 *U. Ill. L. F.* at 144 & nn. 17–19, but apparently chose not to pursue the remedy provided in § 402(b)(5) and did not attempt to have EPA veto the permits issued to the defendants under § 402(d)(2)(A).

think of no other reason for Congress' preserving previously existing rights and remedies than to protect the interests of those who would be able to show that the requirements imposed pursuant to the federal statute are inadequate to protect their interests. When the complaining party is a neighboring state, the federal common law of nuisance provides a peculiarly appropriate remedy.[25]

III.

Elements of the Claim, Relief, and Standard of Proof

The elements of a claim based on the federal common law of nuisance are simply that the defendant is carrying on an activity that is causing an injury or significant threat of injury to some cognizable interest of the complainant. *See Georgia v. Tennessee Copper,* 206 U.S. 230, 238–239 (1907).

It has been said that "in such a suit traditional limitations on equitable remedies are applicable," *United States v. Stoeco Homes,* 498 F.2d 597, 611 (3d Cir. 1974). This would mean that an injunction would be granted only when the right to relief is clear and the remedy at

[25] Although the Administrator's power to veto permits that will result in harm to the waters of a second state provides some protection, as noted above, his authority may be limited to those cases in which the complaining state can point to some applicable effluent limitation or water quality standard that will be violated. Furthermore, the Adminstrator's power to waive review of permits issued to any category of point sources may render any protection that is provided by the veto provisions illusory, §§ 402(d)(3), (e), (f).

law inadequate, *Missouri v. Illinois,* 180 U.S. 208, 248 (1901); Wright & Miller, 11 *Federal Practice and Procedure,* § 2942, 364, 368–369 (1973); *see also Mugler v. Kansas,* 123 U.S. 623, 672–673 (1887).[26] But when a state complains of pollution originating outside its territory the rules are different:

> If the state has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be . . . .
>
> It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted . . . by the act of persons beyond its control . . . . If any such demand is to be enforced this must be, notwithstanding the hesitation that we might feel if the suit were between private parties, and the doubt whether, for the injuries which they might be suffering to their property they should not be left to an action at law.

Georgia v. Tennessee Copper, supra, 206 U.S. at 237–238. Moreover, when the polluting activity is shown to endanger the public health, injunctive relief is generally appropriate. *See Harrison v. Indiana Auto Shredders Co.,* 528 F.2d 1107, 1122–1123 (7th Cir. 1976) (diversity case applying Indiana law).

Similarly, while determining whether to issue an in-

[26] For state law cases to the same effect *see, e.g., Green v. Smith,* 231 Ark. 94, 96, 328 S.W.2d 357, 359 (1959); *Delaware Optometric Association v. Sherwood,* 35 Del.Ch. 507, 511, 122 A.2d 424, 427 (1956); *City of Pana v. Central Washed Coal Co.,* 260 Ill. 111, 122–123, 102 N.E. 992, 997 (1932); *City of Chicago v. Commonwealth Edison Company,* 24 Ill. App. 3d 624, 632, 321 N.E.2d 412, 418 (1974); *Harden Chevrolet v. Pickaway Grain Co.,* 27 Ohio Ops. 144, 147, 194 N.E.2d 177, 180 (Ct.C.Pl. Ohio 1961); *Wade v. Fuller,* 12 Utah 2d 299, 301, 365 P.2d 802, 804 (1961).

junction generally involves a balancing of the interests of the parties,[27] Wright & Miller, *supra,* § 2942 at 366–367 & n. 43, the balance is of less importance when the plaintiff is a sovereign state. *See Georgia v. Tennessee Copper, supra,* 206 U.S. at 238. And if the pollution endangers the public health, injunctive relief is proper, without resort to any balancing. *See Harrison v. Indiana Auto, supra,* 528 F.2d at 1122–1123.

In exercising its original jurisdiction in interstate pollution cases, the Supreme Court has applied a preponderance of the evidence standard when the defendant is a private party, *Georgia v. Tennessee Copper, supra,* 206 U.S. at 238–239, but a clear and convincing evidence standard when the defendant is a state, *New York v. New Jersey,* 256 U.S. 296, 309 (1921); *Missouri v. Illinois,* 200 U.S. 496, 520–522 (1960).[28] In both *New York v. New Jersey* and *Missouri v. Illinois, supra,* 200 U.S. at 520–522, use of the higher standard was attributed to the sovereign status of the defendant. For example, in *New York v. New Jersey* the Court explained that

> the burden upon the state of New York of sustaining the allegations of its bill is much greater than that imposed upon a complainant in an ordinary suit between private parties. Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one state at

[27] For state law cases using this balancing test, *see, e.g.,* Davis, "Theories of Water Pollution Litigation," 1971 Wis. L. Rev. 738, 766–767 n. 130; *see also Harrison v. Indiana Auto. supra,* 528 F.2d at 1123 (diversity case). Wisconsin courts apparently do not use the test. Davis, *supra,* at 767–768 n. 134.

[28] *See also Missouri v. Illinois, supra,* 180 U.S. at 248.

> the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence.

New York v. New Jersey, supra, 256 U.S. at 309. Justice Harlan's opinion for the Court in *Ohio v. Wyandotte Chemicals, supra,* 401 U.S. at 501–502, 504–505, however, suggests that use of the higher standard was a part of an accommodation devised to enable the Supreme Court, structured as it is "to perform as an appellate tribunal," *id.* at 498, to cope with original actions in that Court involving interstate disputes regarding air and water pollution.[29] He also indicated that the higher standard of proof might be appropriate in original actions against private defendants as well. *Id.* at 501 n. 4. Justice Harlan's rationale for requiring the higher standard of proof is inapplicable when the action is tried in a trial court; and the alternative, sovereign state rationale recognized in the earlier cases is inapplicable here, *cf. Illinois v. Milwaukee, supra,* 406 U.S. at 98 (political subdivisions of a state are not "States" as used in 28 U.S.C. § 1251 (a) (1), see note 6, *supra*). Accordingly, we think the correct standard of proof in this case is a preponderance of the evidence [30] rather than clear and convincing evidence,

[29] The complementary part of the accommodation was that the Court imposed on itself "the duty of applying only legal principles 'which [it] is prepared to maintain against all considerations on the other side. . . .'" *Id.* at 501.

[30] Although federal law governs, we note that some state courts have also adopted the preponderance standard in nuisance cases. *See, e.g., City of Northlake v. City of Elmhurst,* 41 Ill. App. 2d 190, 197, 190 N.E.2d 375, 379 (1963); *Iowa v. Miller,* 250 Ia. 1369, 1373, 98 N.W.2d 859, 860 (1959); *Findley Lake Property Owners v. town of Mina,* 31 Misc.2d 356, 154 N.Y.S. 2d 775, 795 (N.Y.Sup.Ct. 1956); *Welborn v. Page,* 247 S.C. 554, 563, 148 S.E. 2d 375, 379 (1966); *see also Boller v. Texas Eastern Transmission,* 87 F.Supp. 603, 605 (E.D. Mo. 1949) (diversity case).

although we can say, as did the district court, that use of either standard would produce the same result.

IV.

Sufficiency of the Evidence Supporting Findings of Fact

The district court found that the defendants dump substantial quantities of pathogen-containing sewage into Lake Michigan each year, that the lake currents carry the pathogens into Illinois waters, where they may infect drinking water supplies and pose a danger to swimmers, and therefore that defendants' actions pose a significant risk of injury to Illinois residents. These findings are not clearly erroneous. Rule 52, Fed. R. Civ. P. The evidence supporting the findings, which we have carefully reviewed,[31] may be summarized as follows:

Any population as large as Milwaukee's will include carriers of enteroviruses,[32] who will excrete the viruses. Therefore the sewage of a city as large as Milwaukee inevitably contains these viruses. Similarly, the sewage of any large city will also contain pathogenic bacteria.

The sewer systems defendants operate have a total of approximately 239 bypass or overflow points from which

[31] In an unpublished order filed with this opinion we discuss the evidentiary support for the district court's findings of fact in detail. Since this factual discussion is of little precedential value, we omit it from this opinion in favor of a short summary. *See* Circuit Rule 35.

[32] Enteroviruses, sometimes referred to as enteric viruses, are those that inhabit the gastroenteric tract of human beings. Many of these viruses are pathogenic, causing diseases such as polio, pleurodynia, myocarditis, meningitis, and encephalitis.

untreated sewage escapes to flow directly or indirectly into Lake Michigan or into rivers that empty into the lake.[33] Most of these overflow points are either pumping stations or what are called "gravity overflows." Both types are triggered by the level of sewage in the system. In the former, pumps are activated by electrodes inside the sewer when the sewage flow reaches the level of the electrodes; when the pumps are activated, raw sewage is either pumped into storm sewers, which empty into rivers that in turn empty into Lake Michigan, or dumped directly into the rivers. The gravity overflows

[33] Both of the defendant commisions act as agents of the Metropolitan Sewerage District of the County of Milwaukee, a municipal corporation that holds title to all property acquired by either commission but is not a defendant in this case. The city commission is responsible for "disposal of the sanitary and industrial sewage generated within the City of Milwaukee and to this end has established and maintained a system of intercepting sewers within the City and . . . operates the Jones Island and South Shore treatment plants; . . . ." The county commission is responsible for "collection and transportation of sanitary and industrial sewage from outside . . . Milwaukee but within the service area of the Metropolitan Sewerage District . . . for disposal at the Jones Island and South Shore treatment plants, all subject to approval by the City Commission; . . . ." *See generally Wis. Stad. Ann.* § 59.96(6) (West). The City of Milwaukee seems to be solely responsible for the sewers within its boundaries, other than the intercepting sewers.

There are 18 bypass points and 31 overflow points on the Metropolitan (or Main) interceptor System, which is the network of sanitary sewers in the Milwaukee metropolitan area that carries sewage to the Jones Island and south Shore treatment plants. Sewage generated in the 26 municipalities within the area first flows into a "lateral sewer" and from there into "local collector sewers," which connect with the Metropolitan Interceptor System. There are 78 overflow points (called "crossovers") on Milwaukee's sanitary sewer system and 112 overflow points on the city's combination storm water and sanitary sewer system (called combined sewer overflows).

are simply pipes placed inside the sewers; when the sewage level rises to that of the pipes, raw sewage pours out into either storm sewers or rivers and then into Lake Michigan. Since both types of overflow points are activated by the level of sewage, an overload or a blockage in the sewers that causes the sewage level to rise will cause overflows, even if the sewer capacity would otherwise be adequate. Because ground water and water from storm sewers sometimes "infiltrates" or flows into sanitary sewers, overflows from the sanitary sewers, as well as from combined sewers, are especially likely during wet weather. In a single month in 1976 the untreated sewage discharged from just 11 of the 239 overflow points totalled 646.46 million gallons.

In addition to the pathogens in the raw sewage that the defendants dump into Lake Michigan, pathogens are contained in the effluent that the South Shore and Jones Island treatment plants discharge directly and indirectly into Lake Michigan [34] when treatment of sewage at those plants is inadequate, as it has sometimes been. Biochemical oxygen demand (BOD),[35] as an indicator of the presence of organic material, and the presence of suspended solids [36] are both significant factors in

[34] South Shore effluent is discharged into Lake Michigan, but Jones Island effluent is discharged into the Milwaukee Harbor and from there flows into Lake Michigan.

[35] Biochemical oxygen demand (BOD) is an "index of the biodegradable organics present in the effluent." *Standard Methods for the Examination of Water and Wastewater,* 513, 544 (14th ed. 1975). BOD is generally "measured over a five-day period," *American Meat Institute v. EPA, supra,* 526 F.2d at 447, hence the abbreviation BOD_5.

[36] As the term suggests, "suspended solids" are "particles of organic and inorganic matter suspended in the water or floating on its surface," *American Meat Institute v. EPA, supra,* 526 F.2d at 447.

evaluating the adequacy of sewage treatment, especially as to virus and bacteria elimination.[37] EPA regulations and the discharge permits issued by the Wisconsin Department of Natural Resources for the Jones Island and South Shore plants require that the average daily BOD_5 (see note 35, *supra*) and suspended solids content of the effluent not exceed 30 milligrams per liter (mg/l) in any 30-day period. Not only were the 30-day average daily limitations frequently violated at Jones Island and South Shore, but also, on occasion, even if these limitations were met, discharges on individual days greatly exceeded the 30 mg/l limitation.[38]

The evidence established that, at temperatures between 40 and 70 degrees Fahrenheit, 90% of the bacteria discharged on any given day will generally "die-off" within two to four days, although they can survive for four to eight days. But, at temperatures between 40 and 50 degrees Fahrenheit, viruses will survive for months; even at 70 degrees, a temperature rarely reached by Lake Michigan except in July and August, viruses will survive for about two weeks. All of the wit-

[37] Chlorine, contained in hypochlorous acid, is one of the most common disinfectants used in sewage treatment and is the only disinfectant used at either Jones Island or South Shore. Ammonia or nitrogen in organic material reacts with chlorine to form compound that are either ineffective or less effective than hypochlorous acid as viricides and bactericides. Viruses or bacteria embedded in suspended solids, organic or inorganic, will be protected from effective chlorination.

[38] Both EPA regulations and the discharge permits impose seven-day daily average BOD_5 and suspended solids limitations of 45 mg/l. We note that on some occasions the defendants' individual day discharges absolutely precluded meeting the seven-day daily average.

nesses who testified concerning the transport of pathogens discharged at Milwaukee into Illinois waters agreed that the southerly currents were strong enough and persisted long enough to carry the pathogens into Illinois waters in less than four days. They differed only as to the number of times that this could be expected to occur in a given year.

Pathogens discharged at Milwaukee will sometimes be carried into Illinois waters close enough to shore to come in contact with swimmers and to be taken in by water treatment plants. A swimmer can be infected by getting contaminated water into his mouth or nose or on a cut or abrasion on the skin. Drinking water can be contaminated by viruses or bacteria in lake water if a water treatment plant malfunctions because of human error or mechanical breakdown. Furthermore, there was evidence that viruses and bacteria can survive the treatment at a drinking water plant, even in the absence of error or breakdown. If viruses or bacteria contaminate the drinking water supplies, Illinois residents ingesting the water can of course become infected.

Defendants estimate that the effluent from Jones Island and South Shore contains about 1,100,000 pounds of phosphorus each year; the phosphorus content of defendants' raw sewage discharges is unmeasured. The district court found that this constituted a substantial contribution to the accelerated eutrophication of the water in the western in-shore zone of Lake Michigan, within the territorial boundaries of the State of Illinois, and also found that the State of Michigan was injured by

accelerated eutrophication, aggravated by defendants' discharges.[39]

V.

Sufficiency of the Evidence Supporting the Relief Granted

A. *Relief Granted by the District Court*

The district court's judgment order requires the defendants to eliminate all overflows, defined as any "crossover, bypass, diversion structure, relief structure, pump station or any other device or mechanism by which human fecal waste is discharged directly or indirectly to public streams, rivers or lakes without collection and treatment," located outside the combined sewer system area by July 1, 1986. [Appendix 2.] As to the 112 combined sewer overflows, the defendants must construct a collection and conveyance system with a storage capacity of 2605 acre-feet [40] by December 31, 1989. Any overflow from this collection and conveyance

[39] "Eutrophication" is a natural process, and refers to the gradual increase of nutrient concentration in a body of water, which in turn causes increasing concentrations of phytoplankton and other living organisms. Man's nutrient inputs may, however, accelerate the evolution. Liminologists regard phosphorus as a "controlling element" in the process. Since phosphorus is necessary to support the growth of phytoplankton, limiting phosphorus imposes an upper limit on the external manifestations of eutrophication, which include reduction of clarity and oxygen content, production of obnoxious odors, and reduction of the quality of drinking water supplies.

[40] An "acre-foot" is "the volume that would cover one acre to a depth of one foot." *Webster's Third New International Dictionary* (Unabridged) 19 (1971).

system must receive minimum "treatment" consisting of "bar screen" filtering, followed by "drum screen" filtering, and chlorination. [App. at 5.] Defendants must either modify existing sewage treatment facilities or construct new facilities to treat all sewage, including that collected in the combined sewer collection and conveyance system, in order to meet the following effluent limitations by December 13, 1986:

> (1) based on 30 consecutive daily samples, an average of 5 mg/l suspended solids, provided that no single sample exceed 10 mg/l suspended solids;
>
> (2) based on 30 consecutive daily samples, an average of 5 mg/l BOD_5, provided that no single sample exceed 10 mg/l BOD_5;
>
> (3) based on daily samples, a free chlorine residual after 15 minutes exposure using the amperometric test;
>
> (4) based on daily grab samples, fecal coliform counts not exceeding 40/100 ml; and
>
> (5) based on daily sampling, a monthly average of 1 mg/l phosphorus. [App. at 6–7.]

The order also provides for evidentiary hearings to secure modifications of the order or to determine whether the provisions of the order have been violated. In any such hearing the defendants must bear the burden of proving by a preponderance of the evidence that the modification is necessary or that any alleged violation of the order did not occur or was excused.

B. *Overflows*

That part of the district court's order requiring defendants to eliminate all overflows outside the combined sewer system by July 1, 1986 and to construct a collection and conveyance system for the combined sewer system that will practically eliminate overflows on the combined sewer system by December 31, 1989 is supported by the evidence and is reasonable.

1. ***Overflows Outside the Combined Sewer Area***

There appear to be no provisions in the Act or EPA regulations expressly forbidding the discharge of raw sewage into public waters from overflow points. Yet such a prohibition is at least implicit in the provisions of § 301.[41] It would be senseless to prohibit the discharge of effluent from publicly owned treatment works not meeting the secondary treatment requirements of § 301 (b) (1) (B), if raw sewage can nonetheless be discharged at will from overflow points before it reaches the treatment works. The discharge permits that the Wisconsin agency issued for the South Shore and Jones Island treatment plants prohibit, except under very limited conditions, any "diversion or bypass" of raw sewage *at the treatment works.* [Wisconsin Pollutant Discharge Elimination System Permits (WPDES Permits): WI-0024775, Part I, p.4 of 6 (South Shore), P.Ex. 63; WI-0024767, Part I, p.4 of 6 (Jones Island), P.Ex. 62.]

[41] *See also* §§ 212 (2) (A), (B), quoted in note 13, *supra;* § 70, 91 Stat. 1608, as amended, 33 U.S.C.A. § 1375 (c); S. Rep. No. 95-370, *supra,* at 81, reprinted in [1977] *U.S. Code Cong. & Ad. News, supra,* at 4406.

Although the discharge permits do not otherwise prohibit overflow discharges, the permits do require the city commission to "initiate" programs "leading to the elimination or control of all discharge overflow and/or bypass points . . . ." [WPDES Permits: WI-0024775, *supra,* Part II, p.7 of 8; WI-0024767, *supra,* Part II, p.5 of 6.] Under the permits, plans for the elimination or control of overflows were to be submitted to the Wisconsin agency by December 31, 1975. It is not clear from the record whether any plans were submitted, or, if they were, what their terms were and what action was taken.

In any event, the provisions of these permits appear to have been modified. In July, 1976, the defendant commissions filed an action in a Wisconsin state court against the Wisconsin Department of Natural Resources, the state's discharge permit issuing agency, challenging the validity of the requirements of the permits issued for South Shore and Jones Island. The state agency answered asserting the validity of the permit requirements and filed a counterclaim, alleging that the defendant commissions had violated the permit effluent limitations on numerous occasions. The state agency also alleged

> that under dry weather and wet weather conditions, bypassing and overflowing occur within the sewerage systems of the Commissions and such discharges must either be eliminated or meet secondary treatment standards by July 1, 1977 . . . .

[*Sewerage Commission of the City of Milwaukee and Metropolitan Sewerage Commission of the County of Milwaukee v. State of Wisconsin Department of Natural Resources,* Stipulation 3 (Wis. Ct. Ct. Case No. 152-342,

May 25, 1977), D.Ex. 1311.]

The state court suit was resolved by a settlement agreement, approved by the court on May 25, 1977, in which the sewerage commissions accepted the requirement that they eliminate *dry weather* bypasses and overflows on the Main Interceptor System by July 1, 1982 [*Id.* at 4], and complete construction of relief sewers by July 1, 1983 [*Id.* at 7, 8]. While construction of relief sewers and the other construction contemplated in the agreement presumably is intended to mitigate overflows, there is no specific date by which *wet weather* overflows must be eliminated. The sewerage commissions also agreed to "coordinate" a district-wide effort to "correct" wet weather bypassing and overflows on the separate sewer systems of the municipalities located within the Metropolitan Sewerage District of the County of Milwaukee, *see* note 33, *supra.* Under the agreement, any of the 26 municipalities within the district, by adopting a "resolution of commitment to the correction of wet weather related bypassing and overflowing within its sewerage system" becomes subject to the supervision of the commissions, which are required to make sure that all "corrective work" is complete by July 1, 1986. [*Id.* at 8–9, 15.] We need not decide whether modification of discharge permits in this manner complies with the procedural requirements of §§ 402(b)(3), (5), (6) or the substantive requirements of §§ 402(b)(1)(A), (B). For our purposes, it is sufficient that the state agency has condemned raw sewage discharges.

It is doubtful whether anyone, layman or expert, would argue that the discharge of raw sewage into public waters is a satisfactory alternative to collection and treatment of sewage, even though it may be conceded that it may take time to fund and provide collection and treatment facilities, and therefore the raw sewage discharges may have to be endured for the short term. Donald Wieland, Director of Engineering for the Sewerage Commission of the City of Milwaukee, flatly stated that discharging raw sewage into public waters as a permanent solution to sewage overloads was not "sound sanitary engineering practice":

> Q. As a design engineer responsible for designing sewers with adequate hydraulic capacity, do you consider it sound sanitary engineering practice to design and install overflow devices which are intended to permit the discharge of raw sewage as a permanent solution to hydraulic overloads on an interceptor system?
>
> A. Certainly not.

[Tr. 201.] Similarly, Dale Lundy, a hydraulic and sanitary engineering consultant called by plaintiffs, testified that collection and treatment is "considered preferable" to discharge of raw sewage. [Tr. 907.] Defendants point to nothing in the record that would even suggest that the discharge of raw sewage into public waters is either an acceptable long range solution to the problem of disposing of human wastes or a practice that can be regarded as safe.

The "crossover" overflow devices on the city's so-called "separate" system also fall within this aspect of

the court's order. Rather than discharging raw sewage directly into public waters, the crossover devices dump the sewage into storm sewers which in turn dump it into the public waters. There may or may not be water in the storm sewers when the crossover devices are activated, and therefore the crossover overflow devices may result in discharges of raw sewage into public waters in precisely the same manner as the overflow devices that dump sewage directly into public waters.[42] We note that the discharge permit apparently issued to the City of Milwaukee by the Wisconsin agency, as modified, *see* note 33, *supra,* requires the city to "initiate a program leading to the elimination of the sanitary sewer crossovers (gravity) and the electrically operated relief pumps" on the city's "separate" sanitary sewer system "to assure attainment of all applicable Water Quality Standards." [Modification of Wisconsin Pollutant Discharge Permit No. WI-0026875, p.1 of 8 (December 17, 1976), D.Ex. 1110.]

We have seen that, depending on the efficiency of the treatment, even effluent from a treatment plant may contain pathogens that pose a danger to Illinois residents and phosphorus that contributes to the accelerated eutrophication of the lake. Obviously then untreated sewage poses a greater danger. We therefore affirm the district court's order to the extent that it requires defendants to eliminate discharges of untreated sewage

[42] As to the significance of any dilution that might occur in the storm sewers *see* the discussion of combined sewer overflows, *infra.*

outside the combined sewer system area.

2. *Overflows Within the Combined Sewer Area*

In considering the city's combined sewer overflows, it is again appropriate to take as a starting point the provisions of the Act. Although there is no provision expressly prohibiting "combined sewer overflows," we think that such a prohibition can be inferred from the general provisions of § 301. For, as noted above, it simply does not make sense to read the statute as authorizing unrestricted discharges of untreated sewage; "dilution" by storm water does not constitute treatment. It seems apparent that the amount of dilution that has taken place when an overflow occurs depends entirely on what the relative volumes of sewage and water in the sewer happen to be at the time of the overflow. The overflow mechanisms do not regulate the amount of dilution or distinguish between pure and diluted sewage. If the total amount of sewage and water introduced into a sewer exceeds its capacity, the excess is discharged into the rivers and the lake; it may be either "diluted" or "undiluted." That the flow from the combined sewers is supposed to go to the treatment plants suggests that not even the city believes that the dilution in the combined sewers is sufficient to render the discharges harmless.[43]

EPA regulations concerning treatment plants that receive sewage from combined sewers recognize that dur-

[43] *See also* the expression of concern about combined sewer overflows in the Senate committee report accompanying the 1977 amendments, quoted *supra; see generally* the definition of treatment works, including "waste in combined storm water . . . sewer systems." § 212, quoted *supra,* note 13.

ing wet weather it may be difficult for a treatment plant to meet secondary treatment effluent limitations, but those treatment plants are not exempt from the requirements of the regulations, and "diluted" sewage, like raw sewage, must be treated before being discharged:

> Secondary treatment may not be capable of meeting the percentage removal requirements . . . during wet weather in treatment works which receive flows from combined sewers (sewers which are designed to transport both storm water and sanitary sewage. For such treatment works, the decision must be made on a case-by-case basis as to whether any attainable percentage removal level can be defined, and if so, what that level should be.

40 C.F.R. § 133.03(a). Implicit is a recognition that dilution alone is inadequate to protect the receiving waters.

The discharge permit that appears to have been issued to the City of Milwaukee required the city to "initiate a program leading to the attainment of control of overflows from the City's combined sewer system . . . to assure attainment of all applicable Water Quality Standards." [Modification of Permit No. WI-0026875, *supra,* at p.5 of 8.] Although the City of Milwaukee was not one of the named plaintiffs in the state court litigation referred to above, the settlement agreement appears to modify this provision and to contemplate "completion of construction [on the combined sewer system] and achievement of applicable water quality standards by July 1, 1993." [*See* Stipulation, *supra,* at 10.] Again we need not decide whether a modification accomplished in this way meets the procedural requirements of the

Act or whether the terms of the modification meet the substantive requirements of the Act. It is enough that neither Congress nor any agency charged with responsibility under the Act has approved the practice of discharging untreated sewage from a combined sewer system into public waters.

The requirements in the district court's order that the defendants collect and treat the sewage in combined sewers before discharging it directly or indirectly into Lake Michigan is proper in light of the evidence. Defendants concede the feasibility of the completion date requirements. [App. at 16.]

3. *Illinois' Regulation of Overflows Within Its Own Jurisdiction*

Defendants attack the overflow elimination provision of the district court's order on the additional ground that Illinois does not even require elimination of sewage overflows within its own jurisdiction. Defendants cite § 602 of the Illinois Pollution Control Board Rules and Regulations, Chapter 3: Water Pollution [P.Ex. 171]. There is precedent, in a case of this kind, for considering the rules of the complaining state as an indication of what is appropriate for the protection of the residents of that state, *Missouri v. Illinois, supra,* 200 U.S. at 525–526.[44] The argument is, on its face, inapplicable to sani-

[44] "Where, as here, the plaintiff has sovereign powers, and deliberately permits discharges similar to those of which it complains, it not only offers a standard to which the defendant has the right to appeal, but, as some of those discharges are . . . [at points where they could cause the injury complained of], it warrants the defendant in demanding the strictest proof that the plaintiff's own conduct does not produce the result, or at least so conduce to it, that courts should not be curious to apportion the blame." 200 U.S. at 525–526.

tary sewer overflows since Illinois does prohibit those, Illinois Pollution Control Board Rules and Regulations, *supra,* § 602(b) (1976) [P.Ex. 171];[45] consequently, we interpret defendants' argument to be that it was improper to order collection and treatment of sewage in the combined sewer system area.

Section 602(c) does not prohibit combined sewer overflows, but "all dry weather flows, and the first blush of storm flows" must meet applicable effluent limitations, which for Lake Michigan are comparable to those imposed by the district court, and new combined sewers are prohibited. *Id.,* § 602(c) (1).[46] Combined sewer flows equal to ten times the average "dry weather flow" must receive "primary treatment and disinfection with adequate retention time." *Id.,* § 602(c) (2). These requirements seem to be comparable to the treatment of overflows from the collection and conveyance system prescribed by the district court. The Illinois regulations further provide that if necessary to prevent sludge accumulation or oxygen level depression, flows greater

[45] Defendants point to one place in Illinois where sewage that has not been fully treated may be discharged into Lake Michigan, *viz.,* Waukegan. At present about twice a year and "ultimately about once a year" some sewage that has only received treatment consisting of 10 hours of sedimentation and chlorination will be discharged into Lake Michigan. [Tr. 13444–13445.] This discharge appears to be in violation of Illinois water pollution regulations, *see* Reply Memorandum of Plaintiff-Appellee State of Illinois 35, and therefore provides little support for defendants' contention.

[46] The Illinois Pollution Control Board Rules and Regulations require all effluents discharged into Lake Michigan to meet a 5 mg/liter suspended solids standard and a 4 mg/liter BOD_5 standard. Ill. Pollution Control Board Regulations, *supra;* § 404(d) [P.Ex. 171].

than ten times the average "dry weather flow" must be treated by "retention and return to the treatment works or otherwise." *Id.,* § 602(c) (3). Thus, it appears that defendants' only complaint based on a comparison with the Illinois regulations relates to the size of the retention facility required by the court.

The details of the relief to be granted are in large part matters left to the trial court's discretion; in any event, the defendants do not provide us with evidence sufficient to justify disagreement with what the court found necessary or evidence sufficient to show that the marginal increase in cost of building a facility of the size required by the district court is significantly greater than the cost of building a facility of the size presumably contemplated by defendants. Furthermore, although Illinois permits some combined sewer overflows, it also, unlike the defendants, requires some treatment. The trial court is not limited by the law of the complaining state with respect to each detail of the relief to be granted.

C. *Effluent Limitations*

Neither the minimum effluent limitations prescribed by EPA pursuant to the provisions of the Act nor the effluent limitations imposed by the Wisconsin agency under the National Pollutant Discharge Elimination System limit a federal court's authority to require compliance with more stringent limitations under the federal common law. Nevertheless, those standards provide guidelines which a court should not ignore.

EPA regulations define "secondary treatment" in

terms of resulting effluent quality, in part, as follows:

(a) *Biochemical Oxygen Demand (five-day).* (1) The arithmetic mean of the values for effluent samples collected in a period of 30 consecutive days shall not exceed 30 milligrams per liter.

(2) The arithmetic mean of the values for effluent samples collected in a period of 7 consecutive days shall not exceed 45 milligrams per liter.

(3) The arithmetic mean of the values for effluent samples collected in a period of 30 consecutive days shall not exceed 15 percent of the arithmetic mean of the values for influent samples collected at approximately the same times during the same period (85 percent removal).

(b) *Suspended Solids.* (1) The arithmetic mean of the values for effluent samples collected in a period of 30 consecutive days shall not exceed 30 milligrams per liter.

(2) The arithmetic mean of the values for effluent samples collected in a period of 7 consecutive days shall not exceed 45 milligrams per liter.

(3) The arithmetic mean of the values for effluent samples collected in a period of 30 consecutive days shall not exceed 15 percent of the arithmetic mean of the values for influent samples collected at approximately the same times during the same period (85 percent removal).

40 C.F.R. § 133.102. As noted above, for publicly owned treatment works the Act requires no more than secondary treatment until July 1, 1983, when they must implement the "best practicable waste treatment over the life of the [treatment] works." § 201(g)(2)(A); *see* § 301(b)(2)(B). While point sources must comply with

any more stringent requirements of the states in which they are located, Wisconsin does not appear to have adopted any more stringent limitations; the discharge permits issued to the defendants in this case do not impose any more stringent limitations than those in EPA's regulations.

Both the South Shore and Jones Island plants must meet the following conditions under their discharge permits:

(1) based on daily samples, a monthly average of 30mg/l BOD_5 and a weekly average of 45 mg/l BOD_5, provided that neither the monthly nor the weekly average ever exceed 15% of the average BOD_5 content of the influent during the same period (85% removal);

(2) based on daily samples, a monthly average of 30mg/l suspended solids and a weekly average of 45 mg/l suspended solids, provided that neither the monthly nor the weekly average ever exceed 15% of the average suspended solids content of the influent during the same period (85% removal);

(3) based on twice weekly "grab samples," a monthly average fecal coliform count of 200/100 ml and a weekly average fecal coliform count of 400/100ml;

(4) based on daily samples, a monthly average of 1mg/l phosphorus; and

(5) monitoring of both total residual chlorine and available "free" chlorine in the effluent, but no specific requirements.

[Permit No. WI-0024775 (South Shore) P.Ex. 63; Permit No. WI-0024767 (Jones Island) P.Ex. 62.] All of the effluent limitations imposed by the district court, except the

phosphorus limitation, are significantly more stringent than those prescribed by EPA or in the discharge permits; in lieu of 30 mg/l BOD_5 and suspended solids, the district court requires 5mg/l; in lieu of 200 fecal coliform cells per 100 ml, the district court requires 40/100ml; in lieu of the monitoring requirement for chlorine, the district court requires a free chlorine residual 15 minutes after exposure. Further, as to BOD_5 and suspended solids, the district court imposes an absolute maximum of 10 mg/l instead of the variable 85% removal requirement in the EPA regulations and the discharge permits.

These effluent limitations imposed by the district court all relate to the hazard presented to Illinois residents by Milwaukee's discharge of sewage containing pathogens. Although aware that these limitations could be consistently met only by constructing what are referred to as "advanced waste treatment" plants, the court found that such treatment was necessary to protect Illinois residents from the danger presented by Milwaukee's discharges. [Tr. 14248–14249.] We are unable to conclude, after a careful examination of the evidence cited by plaintiffs to justify the limitations imposed, that this evidence was sufficient.

We recognize that once liability has been established, a trial court has broad authority to fashion appropriate relief. This rule is particularly applicable in an area of law where the appropriate relief will invariably depend on the circumstances of each case. *See, e.g., Washington v. General Motors Corp.*, 406 U.S. 109, 115–116 (1972). Nevertheless, a court, unlike a legislature or an administrative agency, is not free to rest solely upon what it thinks desirable; there must be evidence to support its conclusion that the relief granted is necessary to protect the complaining party from harm.[47]

To support the 5 mg/l BOD_5 and suspended solids limitations imposed by the district court, Illinois relies on the testimony of one witness who asserted that even at 30 mg/l suspended solids "you are going to have a lot of organics tied up with solids that is going to use up your chlorine, and that the chlorine can't even get into." Further, Illinois cites the general testimony that organic matter and suspended solids interfere with effective chlorination and therefore should be reduced as much as possible. Illinois also relies on the testimony of one witness that the kind of treatment required to meet the 5 mg/l standard is preferable to the kind of treatment now used by the defendants. And finally, Illinois points to evidence that one of the defendants' consultant sanitary engineers recommended treatment comparable to that required to meet the 5 mg/l standard, that three cities have been required to meet similar limitations, and that several cities have voluntarily decided to modify their own treatment facilities in ways similar to that which would be required under the district court's order.[48]

[47] *Cf. Milliken v. Bradley*, 433 U.S. 267, 280 (1977) ("[L]ike other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. . . . The remedy must therefore be related to 'the condition alleged to offend the Constitution. . . .' ").

[48] We only summarize the evidence in this opinion; the evidence relied on by Illinois is discussed in detail in the unpublished order filed with this opinion. *See* note 31, *supra*.

The evidence shows that suspended solids and organic matter interfere with chlorination, and therefore that there is some correlation between suspended solids and BOD_5 and effective chlorination. The evidence does not, however, show how much more effective chlorination would be a 5 mg/l suspended solids and BOD_5 than at 30 mg/l suspended solids and BOD_5; the difference may be significant or it may be *de minimis*.[49] [Compare Tr. 12398–12400 with Tr. 13399–13400.]

That a few cities have adopted the more stringent standards is hardly enough to prove that those standards are necessary here, especially when the persons to be protected are many miles down the lakeshore from the discharge points. *Cf.* Comptroller General of the United States, "Report to Congress: Better Data Collection and Planning is Needed to Justify Advanced Waste Treatment Construction" (1976) [D.Ex. 1105] (pointing out

[49] Wellings testified that tests had failed to demonstrate any viruses in effluent containing only 5 Jackson Turbidity Units per liter. [Tr. 12399.] But Wellings' work focused primarily on the virus content of effluent from treatment facilities and not on removal efficiencies. [Tr. 13399.] For the purpose of determining whether significant benefits will result from reducing solids and BOD_5 from 30 mg/l to 5 mg/l, it is not enough to know that tests have shown viruses in effluent from a plant designed to meet the 30 mg/l standard and similar tests have failed to show viruses in a plant designed to meet the 5 mg/l standard. Nor is it enough to take random influent samples and random effluent samples, for the virus content of the sewage necessarily varies. Virus content in the influent may be much more significant than the particular solids or BOD_5 level the plant is designed to achieve. Furthermore, the flow rates at the time the tests are conducted are important, for it is virtually meaningless to say that a plant designed to meet the 5 mg/l standard performs better than an overloaded plant designed to meet the 30 mg/l standard. [*See* Tr. 12377–12378 (Wellings).]

that several cities began construction of advanced waste treatment facilities without adequate consideration of the expected costs and benefits of such facilities).

Our difficulty with the evidence reviewed above is that it consists merely of conclusions of the experts and does not explain why the particular standards are necessary to protect the health of Illinois residents.[50] We are asked to accept the conclusions on faith. It is difficult for us to see how the opinion of an expert can be intelligently appraised unless it is supported by reasons. This is especially so when the opinion is offered to support effluent limitations markedly lower than (a) those established by EPA in its regulations, (b) those established by the state permit authority with the duty of protecting residents in the immediate environs of the discharges, and (c) those established by the complaining state itself for waters other than Lake Michigan.[51] The record is

[50] While Wellings, who comes the closest to providing evidentiary support for the suspended solids limitations the court imposed, testified that "the problem with 30 milligrams per liter is you are going to have a lot of organics tied up with solids that is going to use up your chlorine, and the chlorine can't even get into," and there would "still" be "a problem with disinfection," she did not say the same would be true of any figure between thirty and five. She went on to say that she did not "know how she would equate Jackson Turbidity Units [on which her relevant experience was based] with milligrams, . . . because you would have to know size, shape and all that, source, because of the test itself," and then said 5 mg/l "would be well in the ball park," and she "wouldn't want any more than five." This is a speculative and uncertain basis for the court's implied conclusion that effluent limitations specifically adopted by EPA and the Wisconsin agency are insufficient to protect the health of people more than 25 miles from the discharge points. *See also* note 49, *supra*.

[51] Illinois Pollution Control Board Rules and Regulations, *supra*, § 404 [P.Ex. 171].

conspicuously silent as to the reasons these less stringent standards were found adequate to protect persons in the immediate environs of the discharges by experts who were presumably as dedicated to the protection of public health and the environment as those on whose conclusions plaintiffs rely, and why those reasons are inapplicable here, especially when the discharges occur at least 25 miles from any of the persons to be protected. In short, plaintiffs point to nothing in the record, and we have found nothing, to connect the effluent limitations imposed by the district court with the protection of Illinois residents. If enforcement of the limitations imposed in the discharge permits proves inadequate to protect Illinois residents, then more stringent limitations may become necessary. But on the record before us, we cannot sustain the district court's order in this respect.[52]

Also relevant to this aspect of the remedy is Congress' treatment of publicly-owned treatment facilities in the

[52] In the statement of facts contained in Illinois' first brief we were told: "Not only does sewage provide the basic element of phosphorus [which is necessary for eutrophication], but also it contains a whole series of nutrients . . . 'a very rich nutrient broth' for aquatic plant growth (Tr. 2889)." Illinois does not, however, attempt to sustain the effluent limitations imposed by the district court on this basis. Indeed, it is not even clear that this "fact" is relevant to the effluent limitations. There does not appear to be any evidence as to the relative "nutrient" content of effluent from treatment works designed to meet the 30 mg/l suspended solids and BOD_5 standards and those designed to meet the 5 mg/l standards. Presumably, the nutrient content of effluent from a plant meeting the 5 mg/l standards is lower than that of a plant meeting the 30 mg/l standards. But whether the difference is significant with respect to eutrophication of Lake Michigan is not clear.

1972 and 1977 amendments to FWPCA. Secondary treatment facilities, which are not capable of meeting the 5 mg/l limitations, are permitted under 33 U.S.C. § 301 (b) (1) (B) until July 1, 1983, when "the best practicable waste treatment over the life of the works" becomes the requirement. Although Congress did not attempt to answer the public health questions, leaving them to EPA and state agencies acting under EPA's supervision, the provisions of the Act are at least an indication of Congressional reluctance to risk pushing municipalities beyond the limits of their resources. The 1977 amendments, summarized above, show a deepening concern on this score. Congress' position in the Act does not, as we have held, mark the limits of our power in this common law nuisance action, but the policy underlying that position, to which we should give some deference, is at least a reason not to allow the nature of the action to cause a relaxation of the requirements of evidentiary foundation that would normally be observed in other kinds of actions.[53]

It is not clear whether the fecal coliform limitation and the free chlorine residual requirement imposed by the district court can be met with secondary treatment. In any event, the record support for these limitations is as deficient as it is for the suspended solid and BOD_5

[53] Plaintiff also relies on Illinois statutory and common law. The district court indicated that under any of the asserted grounds for relief the result would be the same. [App. 20–21.] But it is federal common law and not state statutory or common law that controls in this case, *Illinois v. Milwaukee, supra,* 406 U.S. at 107 & n. 9, and therefore we do not address the state law claims.

limitations, and we are provided with no explanation of why such limitations were not included in the NPDES permits for the plants and the federal regulations.[54]

Our treatment of the effluent limitations imposed in the district court's order is not inconsistent with our treatment of the overflow requirements of the order. First, and we think most important, the evidence presented supports the district court's finding that the defendants' discharges of raw sewage, whether diluted or not, pose a significant risk of injury to Illinois residents. Raw sewage contains vastly higher concentrations of pathogens than treated sewage. Millions of gallons of raw sewage are dumped into the water each year from the 239 overflow points on the defendants' sewage systems, most frequently during wet weather, but also during dry weather. Lake currents can and do sometimes carry the pathogens into Illinois waters close to shore.

Second, no one even attempts to justify such discharges as harmless or insignificant. As we have said, it is arguable that the Act itself prohibits discharges of raw sewage. The Wisconsin agency has taken steps to eliminate some overflows and to "correct" others although giving the defendants a longer time to take the neces-

[54] In addition we note that Illinois' general effluent standard fecal coliform limitation is 400/100 ml. *See* Illinois Pollution Control Board Rules and Regulations, *supra*, § 405 [P.Ex. 171]. The "water quality" fecal coliform limitation for Lake Michigan is 20/100 ml. Ill. Pollution Control Board Rules and Regs., *supra*, § 206(d) [P.Ex. 171]. For the effect of a more stringent water quality limitation then effluent limitation *see id.* § 201(a) [P.Ex. 171]. There does not appear to be any effluent limitation specifically requiring a chlorine residual, either "free" or total.

sary action than did the district court. But as stated above the defendants have conceded that compliance with the deadlines imposed by the court is feasible.

On the other hand, the evidence supporting the effluent limitations is weak, at best. They are more stringent than those required by Congress, EPA, and the Wisconsin discharge permit issuing agency. And there is no evidence as to why the limitations deemed adequate to protect the inhabitants in the vicinity of the discharges are inadequate to protect the residents of Illinois who are at least 25 miles away.

The phosphorus limitation imposed by the district court can be achieved using secondary treatment; an identical limitation is prescribed in the defendants' discharge permits.[55]

We affirm the district court's order to the extent that it requires the elimination of all sewage overflows and imposes a 1 mg/l phosphorus effluent limitation. We reverse the court's order insofar as it imposes suspended solids, BOD_5, fecal coliform, and free chlorine residual effluent limitations more stringent than those prescribed in defendants' discharge permits. The case is remanded to the district court with directions to modify the injunctive order in conformity with the rulings of this court.

AFFIRMED IN PART,

[55] Illinois' phosphorus effluent standard is 1 mg/l; its water quality standard for Lake Michigan is .007 mg/l. *See* Illinois Pollution Control Board Rules and Regulations, *supra*, §§ 407, 206(c) [P.Ex. 171].

REVERSED AND REMANDED IN PART.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

Supreme Court, U. S.
FILED
AUG 3 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-15

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY,
a Political Subdivision of the State of California,
PEOPLE OF THE STATE OF CALIFORNIA,
LEAGUE TO SAVE LAKE TAHOE, and SIERRA CLUB,
Petitioners,

vs.

TED JENNINGS, OLIVER KAHLE,
HARVEY'S WAGON WHEEL, INC., and COUNTY OF DOUGLAS,
a Political Subdivision of the State of Nevada,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LAXALT AND BERRY
One East Liberty Street
Reno, Nevada 89501
Attorneys for Respondent Harvey's Wagon Wheel, Inc.

MICHAEL ROWE
Douglas County District Attorney
Courthouse
121 Eighth Street
Minden, Nevada 89423
Attorney for Respondent Douglas County

McDONALD, CARANO, WILSON, BERGIN, BIBLE, FRANKOVICH & HICKS
241 Ridge Street
P.O. Box 2670
Reno, Nevada 89505
Attorneys for Respondent Ted Jennings

BREEN, YOUNG, WHITEHEAD, TERZICH & BELDING
232 Court Street
Reno, Nevada 89501
Attorneys for Respondent Oliver Kahle

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7832

SUBJECT INDEX

	Page
Questions presented	1
Statutes involved	2
Statement of the case	2
Reasons why a writ of certiorari should not be granted	4
I	
This case does not present critical issues concerning obligations between states under either an interstate compact or federal common law	4
II	
The sufficiency of the findings of Douglas County, a political subdivision of the State of Nevada, is not a federal concern, much less a question of federal law of such importance that Supreme Court review is required	7
III	
This action is barred by the Nevada statute of limitations	11
IV	
The court of appeals correctly held that where an alleged interstate nuisance is anticipatory and the projects complained of were approved under an interstate compact establishing environmental controls governing said projects, the complaining state's federal common law nuisance claim may be dismissed on the pleading	17
Conclusion	23

TABLE OF AUTHORITIES CITED

Cases

	Page
Buchanan v. Buchanan, 523 P.2d 1 (Nevada 1974)	10
Chicago R. I. & P. & R. Co. v. Stude, 436 U.S. 574 (1954)	13
Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971)	10
Dutertre v. Shallemberger, 34 P. 449 (Nevada 1893)	10
Holmberg v. Armbrecht, 327 U.S. 392 (1946)	16
Illinois v. City of Milwaukee, ... F.2d ... (Number 77-2246, April 26, 1979) (App. H)	4, 7, 20, 21
League to Save Lake Tahoe v. BJK Corp., 547 F.2d 1072 (9th Cir. 1976)	3, 13, 16
League to Save Lake Tahoe v. TRPA, 558 F.2d 914 (9th Cir. 1971)	15
League to Save Lake Tahoe v. TRPA, 507 F.2d 517 (9th Cir. 1974)	15
League to Save Lake Tahoe v. TRPA, 563 P.2d 582 (Nevada 1977)	13, 15
Marshall Field & Co. v. NLRB, 318 U.S. 253 (1953)	9
Moore v. Illinois Central R. Co., 312 U.S. 630 (1941)	13
Occidental Life Insurance Co. v. EEOC, 432 U.S. 355 (1977)	16
People of the State of California ex rel. Evelle J. Younger v. TRPA, et al., 516 F.2d 215 (9th Cir. 1975) cert. den. 423 U.S. 868 (1975)	6, 8, 12, 15
Ryan v. Pitkin Iron Corporation, 444 F.2d 717 (1971)	19
State ex rel. Sweikert v. Briare, 588 P.2d 54 (Nevada 1978)	11
Turk v. Nevada State Prison, 575 P.2d 599 (Nevada 1978)	11
United States v. L. A. Tucker Trucklines, 344 U.S. 33 (1952)	9
Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978)	9
Village of Euclid v. Ambler Realty Company, 272 U.S. 365, 47 S.Ct. 114 (1926)	19

Statutes

Nevada Revised Statutes:	
Section 278.010-278.630	13, 14
Section 278.025	14
Section 278.027	2, 3, 11, 13, 14, 15, 16, 17

Other Authorities

	Page
Tahoe Regional Planning Agency Compact:	
Article I(c)	17
Article III(g)	8
Article VI(a)	8
Article VI(k)	8
Tahoe Regional Planning Agency Land Use Ordinance:	
Section 7.13	10
Section 8.33	10

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Ted Jennings, Oliver Kahle, Harvey's Wagon Wheel, Inc., and County of Douglas, jointly file this Brief in Opposition to the Petition for Writ of Certiorari.

QUESTIONS PRESENTED

1. Whether the Nevada Statute of Limitations is applicable to the administrative decisions of Douglas County, a political subdivision of the State of Nevada.

2. If this action is not barred by the Nevada Statute of Limitations, is there any legal requirement that Douglas County makes formal and specific written findings in issuing an Administrative Permit, and if so, whether the findings made by Douglas County were sufficient?

3. Whether Petitioners have sufficiently stated a claim for interstate nuisance which is anticipatory and allegedly results indirectly from Respondents' respective projects.

STATUTES INVOLVED

There are no Federal statutes involved in the within action. This case involves an interpretation of the Land Use Ordinance of the Tahoe Regional Planning Agency which is set forth in Appendix E of the Petition.

Nevada Revised Statute 278.027 is also involved and is set forth in Appendix G to the Petition.

STATEMENT OF THE CASE

The within consolidated actions are the sixth and seventh suits instituted by some or all of the Petitioners against some or all of the Respondents attacking the permits for the respective projects of Respondents as approved by Douglas County and the Tahoe Regional Planning Agency.

Each of the Respondents was issued an Administrative Permit by Douglas County for the construction of hotel and casino facilities in 1973. Each of these Permits was subsequently deemed approved as a matter of law in accordance with the Tahoe Regional Planning Compact (Appendix D). In the present case, Petitioners seek judi-

cial review of the administrative action of Douglas County more than four years after that action was taken. The substance of Petitioners' claim is that Tahoe Regional Planning Agency's Land Use Ordinance prohibits any height in excess of forty feet and that there was insufficient evidence to support the approvals and findings made by Douglas County in issuing the Administrative Permits and authorizing a height in excess of forty feet for Respondent's projects. Petitioners also claim that Respondents' projects, by attracting vehicles to the Tahoe Basin, will at some point in time constitute a Federal common law nuisance.[1] Neither the TRPA nor the State of Nevada was made a party to this action.

In the District Court, Petitioners' Complaint was dismissed pursuant to Motions to Dismiss and for Summary Judgment filed by Respondents. These motions were granted after the District Court held a hearing on Respondents' motions, as well as Petitioners' Motion for Summary Judgment and for Preliminary Injunction. The District Court dismissed Petitioners' claims on a multitude of grounds. In affirming, the Ninth Circuit addressed only the issue of the applicability of Nevada Revised Statute 278.027 and the common law nuisance claim.

---

[1]Petitioners have now apparently abandoned their claim that the Land Use Ordinance prohibits as a matter of law all height in excess of forty feet. However, it was solely this interpretation of the Land Use Ordinance upon which the Ninth Circuit and the District Court found Federal jurisdiction based on the case of *League to Save Lake Tahoe v. BJK Corp.* 547 F.2d 1072 (9th Cir. 1976). The District Court and the Ninth Circuit addressed the other issues based only on pendent jurisdiction. (See Ninth Circuit Opinion, Page 11, Petitioners' Appendix and Footnote 5, Page 27) Thus with the possible exception of the nuisance claim, Appellants have abandoned the only claim upon which Federal jurisdiction was based.

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

Petitioners' basis for seeking a Writ of Certiorari in the present case is that the Ninth Circuit has decided an important question of Federal law which has not, but should be, settled by the United States Supreme Court, and that the Ninth Circuit Opinion on the nuisance claim is in conflict with a decision by the Seventh Circuit in the case of *Illinois v. City of Milwaukee*. Neither of these reasons has merit.

I

THIS CASE DOES NOT PRESENT CRITICAL ISSUES CONCERNING OBLIGATIONS BETWEEN STATES UNDER EITHER AN INTERSTATE COMPACT OR FEDERAL COMMON LAW.

Petitioners state that with numerous interstate compact agencies making decisions affecting millions of Americans, all actions of local agencies acting under a compact should follow the same administrative law procedures. They argue:

> 1. "Otherwise findings may be required in one state but not in another to sustain decisions under a common regulation." (Petitioners' Brief at p. 13)
>
> 2. "The decision also ignores the fact that essence of a compact intended to protect natural resources is to insure that 'vigilance of one state is not thwarted by inaction, or lax administration in an adjoining state." (Petitioners' Brief at p. 13)

In response thereto, Respondents contend that Petitioners' purported perception of critical issues is a poorly

camouflaged effort to persuade this Court to rewrite the compact.

California entered into the compact to help coordinate and control growth and development in the Lake Tahoe Basin. As an equal party in the interstate agency (TRPA) under the compact, California participated in the adoption of a regional plan and ordinances to regulate new construction in the Basin.

Pursuant to the compact, the TRPA delegated initial permit granting functions to local authorities. This action was consistent with the jealous retention of sovereignty by the two parties to the compact.

The Court of Appeals stated,

> "Although the Ordinance does not specify the procedures to be used by local permit-issuing authorities, § 3.00 does define an 'Administrative Permit' as 'A permit issued by a permit-issuing authority *in accordance with its procedures.*'" (Italics added). "The Ordinance thus clearly intended local administrative procedures to apply to the initial issuance." (App. A, at p. 14)

By consenting to the compact, Congress did no more than incorporate the agreement of the two states into the body of Federal law. It did not make applicable to the agreement the entire armament of Federal administrative and substantive standards.

The Court of Appeals continued:

> "It cannot be gainsaid that the understanding of Congress about the meaning of the Compact is important; but the actual agreement of the States is

> certainly no less so. We believe that the proper balance between the respective sovereigns requires that the intention of the two States, acting through TRPA, govern the meaning of the L.U.O. to the extent that intention is not in conflict with the Compact itself." (App. A at p. 16)

The Court then determined that the TRPA delegated the power to local permit-issuing authorities to issue administrative permits in accordance with normal procedures. It concluded that the TRPA did *not* seek to establish one uniform procedural process but rather it sought to establish standards to be applied by state entities according to *their* traditional land use determination procedures, retaining discretionary power to overturn or modify the decision if it so chose.

While there might be much to commend a Uniform Administrative Procedures Act expressly made applicable to all interstate compacts by the participants, such is not the case here. As the Court properly noted in *People ex rel. Younger v. TRPA,* 516 F.2d 215, 220 (9th Cir. 1975),

> "(The Compact is the result) of deliberate action by the legislatures of Nevada and California and the Congress of the United States. This court is not empowered to rewrite the Compact. California's remedy lies solely with the legislative branches of the parties to the Compact."[2]

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[2]It is worth noting that California's interest in the interstate compact is apparently waning. A story in the Reno Evening Gazette under date of July 16, 1979, stated;

> "Friday, California Governor Edmund Brown, Jr., vetoed his state's share of the bi-state agency's funding before signing the state's budget. Brown eliminated $75,000.00 for TRPA which California Resources agency director Huey Johnson acknowledged 'buried' the bi-state compact."

The laws applicable to and the procedures to be followed by any bi-state agency must be determined solely by reference to the Charter Document of the particular agency. In the present case, the Charter Document is the TRPA Compact. The TRPA Compact is truly unique. The Ninth Circuit ruling that Nevada law was applicable to the action of Douglas County, a political subdivision of the State of Nevada, is predicated upon the language of the TRPA Compact and of the ordinances adopted pursuant to that Compact. This holding by no means establishes that local state law should be applied in every instance under every bi-state agreement or compact.

Next, Petitioners contend that the Court of Appeals decision poses a critical issue involving common law. Petitioners state that the decision of the Ninth Circuit is in conflict with the 7th Circuit's recent decision in *Illinois v. City of Milwaukee,* ..... F.2d ..... (Number 77-2246, April 26, 1979) (App. H). However, the *City of Milwaukee* case is clearly distinguishable from the present case. A complete discussion of the *City of Milwaukee* case is set forth in Section IV of this brief.

II

THE SUFFICIENCY OF THE FINDINGS OF DOUGLAS COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, IS NOT A FEDERAL CONCERN, MUCH LESS A QUESTION OF FEDERAL LAW OF SUCH IMPORTANCE THAT SUPREME COURT REVIEW IS REQUIRED.

Because the Ninth Circuit held that the within action was barred by the applicable Nevada Statute of Limitations,

the Ninth Circuit never reached the question of whether findings are required or whether the findings that were made are sufficient under the Land Use Ordinance of the TRPA.

It is beyond dispute that the drafters of the TRPA Compact reserved substantial power and authority in the respective states and in the political subdivisions of the states. This overriding intent is best demonstrated by the dual majority provision in the Compact (Article III(g)), the sixty-day rule (Article VI(k)), and the Land Use Ordinance (Petitioners' Appendix E)[3].

The authority that the TRPA does have is only exercised when the governing body of the TRPA reaches a dual majority vote. *Younger v. TRPA*, 516 F.2d 215 (9th Cir. 1975) cert. denied 423 U.S. 868. Zoning and permit matters are left to the local political subdivisions. To the extent that there may be differences in the procedures and the laws applicable to the various political subdivisions surrounding Lake Tahoe, those differences were intended to be continued by the drafters of not only the Compact but also the TRPA Land Use Ordinance. It is an important fact that the within case is seeking judicial review of the administrative decision of Douglas County and not of any action or even the failure to take action by the TRPA itself.

[3]There are other indications of reservation of powers in the Compact, including the so-called "Gaming Grandfather Clause" set forth in Article VI (a) which requires that all TRPA ordinances and policies recognize gaming as a permitted and conforming use on any property that was zoned for gaming prior to the existence of the TRPA.

When the Compact and the TRPA Land Use Ordinance expressly reserve substantial authority for local governments, it necessarily follows that those local entities acting within their authority are subject to state law, and not a comprehensive system of Federal common law.

In the present case, Douglas County followed all applicable procedures in issuing the Administrative Permits to Respondents, which included a public hearing with timely advance notice of such hearing, together with an opportunity for all interested parties to be heard. None of the Petitioners herein claiming that Douglas County acted in an arbitrary manner even bothered to appear at the public hearings before the Douglas County Commissioners and to state their objections to the Administrative Permits of the Respondents.[4]

Each of the Respondent hotels submitted voluminous information and materials to Douglas County and made presentations at the public hearings. The administrative record as presented to the District Court is voluminous. Douglas County acted upon the applications of the respective hotels for their permits on April 24, 1973 (Oliver Kahle), on May 5, 1973 (Ted Jennings), and on June 20, 1973 (Harvey's Wagon Wheel, Inc.). The District Court held the record of each of the Respondents was sufficient to support the issuance by Douglas County of the permits

[4]Petitioners' failure to appear, much less meaningfully participate in the hearings before Douglas County, is sufficient in and of itself to preclude the within action, and the District Court so held. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978); *United States v. L. A. Tucker Trucklines*, 344 U.S. 33 (1952); *Marshall Field & Co. v. NLRB*, 318 U.S. 253 (1953). It was not necessary for the Ninth Circuit to reach this issue.

in question. Douglas County's action did not violate any rule, regulation, or ordinance of the TRPA, the TRPA Compact, or any Federal law.

There is no requirement under the TRPA Land Use Ordinance or in the Compact that the permit issuing authority make specific written findings in issuing an Administrative Permit, including one that authorizes a height in excess of forty feet. Neither Section 7.13 nor 8.33 of the Land Use Ordinance requires formal written findings. Under Federal law, unless specifically required by statute, formal findings are not necessary. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

There is no authority, either statutory or judicial, in the State of Nevada that would require Douglas County to make written findings or specific subfindings. In Nevada, the Courts look not to a statement of findings, but rather to the evidence contained in the record of the hearing. In Nevada, the Court follows the "implied findings" doctrine, which provides that in the absence of any express findings, the Court will imply findings in favor of the decision reached if the evidence supports the implication. *Dutertre v. Shallemberger*, 34 P. 449 (Nevada 1893); *Buchanan v. Buchanan*, 523 P.2d 1 (Nevada 1974).

Under Nevada law, judicial review of an administrative decision is confined to the evidence presented at the hearing to determine if the decision was supported by substantial evidence. The reviewing court does not weigh the evidence presented, but examines it to determine if it contains substantial evidence in support of the decision so that a conclusion may be drawn that the administrative

body did not act arbitrarily and capriciously. *State ex rel. Sweikert v. Briare*, 588 P.2d 54 (Nevada 1978); *Turk v. Nevada State Prison*, 575 P.2d 599 (Nevada 1978).

The Compact and the TRPA ordinances have delegated the permit granting function to local authorities who are governed by their normal, and traditional land use determination procedures. Included in this reservation or delegation, as the case may be, must be the process by which such action may be challenged as established by the statutes and courts of the state in which the local authority is located. Insofar as the procedures utilized do not misinterpret the Compact or the TRPA ordinances or fail to provide adequate review to assure compliance with local procedures, the action of Douglas County is a matter of state law.

III

THIS ACTION IS BARRED BY THE NEVADA STATUTE OF LIMITATIONS.

Petitioners claim that the Ninth Circuit Court of Appeals erred in holding that Nevada Revised Statute 278.027 (Appendix G) bars the within action. In essence, 278.027 requires that judicial review of the decision of the governing body of a county to grant any special use or variance permit must be commenced within twenty-five (25) days. When this case is put in its proper perspective, it becomes abundantly clear that the Ninth Circuit did not err in holding that NRS 278.027 barred the within action.

The substance of Petitioner's claim is that the Board of Commissioners of Douglas County, a political subdivision

of the State of Nevada, acted arbitrarily in issuing Administrative Permits (special use permits) to Respondents on the grounds that Respondents' projects exceeded 40 feet in height and that there was insufficient evidence to support the determinations and findings made by Douglas County in authorizing a height in excess of 40 feet and in issuing the Administrative Permits. Petitioners commenced this action seeking judicial review of the administrative decisions of Douglas County more than four years after those decisions were made and the Permits were issued. In addition, the Petitioners did not even appear before Douglas County to voice their opposition to the Administrative Permits.

The language of the Compact, as well as its legislative history and the judicial interpretations thereof all indicate that the TRPA Compact intended to and did reserve substantial authority to the individual states and the local governmental entities within each state. The TRPA is not an omnipotent zoning board whose approval is a prerequisite to all development and who can enforce its will over the majority vote of one state's delegation. The authority to issue permits remains in the hands of the local zoning authorities, which, in the present case, was Douglas County. The TRPA only has a limited review function. *People of the State of California ex rel. Evelle J. Younger v. TRPA, et al.*, 516 F.2d 215 (9th Cir. 1975) Cert. denied 423 U.S. 868 (1975). This is not an action to review any action taken by the TRPA; and despite Petitioners' protestations to the contrary, this is not an action to determine the nature and scope of obligations between two states. Indeed, the State of Nevada is not even a party to

the within action. Neither does the question of substantial evidence to support the determination of Douglas County or whether findings are required involving an interpretation of any TRPA ordinance. Petitioners are thus seeking judicial review of an administrative decision of a political subdivision of the State of Nevada, yet contend that the Nevada laws are not applicable to that political subdivision.[5]

Petitioners claim that the Ninth Circuit misinterpreted NRS 278.027, even though the Ninth Circuit interpretation followed the interpretation of the Nevada Supreme Court in the decision of the *League to Save Lake Tahoe v. TRPA*, 563 P.2d 582 (Nevada 1977) a case brought in State Court by the Petitioner, League to Save Lake Tahoe, which is virtually identical to the within case. The judicial construction of NRS 278.027 by the Nevada Supreme Court is a part of the statute. *Moore v. Illinois Central R. Co.*, 312 U.S. 630 (1941). The decisions of the Nevada Supreme Court and the Ninth Circuit recognize that a county is a creature of statute with limited jurisdiction. A county cannot act except pursuant to express legislative authority. The only statutory authority in the State of Nevada enabling a county to act with respect to zoning or land use matters is set forth in Nevada Revised Statutes 278.010 through 278.630. Thus the action taken by Douglas County

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[5]There is a substantial question of Federal jurisdiction in this case since it does not involve an interpretation of any Federal law or the TRPA Ordinance which would substantially effect the effective functioning of the TRPA Compact. *League to Save Lake Tahoe v. BJK Corp.*, 547 F.2d 1072 (9th Cir. 1976). The U. S. District Court "does not sit to review on appeal action taken administratively or judicially in a state proceeding." *Chicago R. I. & P. & R. Co. v. Stude*, 436 U.S. 574 (1964).

in issuing the Administrative Permits to the Respondents in the within case was necessarily pursuant to that legislative grant of authority. NRS 278.027 is expressly applicable to action taken by a county pursuant to NRS 278.010 to 278.630.

The holding of the Ninth Circuit and the Nevada Supreme Court is further supported by Nevada Revised Statute 278.025[6] which provides in part as follows:

> "The powers conferred by NRS 278.010 to 278.630, inclusive, shall be exercised whenever appropriate in furtherance of a plan adopted by the regional planning agency."

NRS 278.025 was enacted in 1968 as Section 1 of a bill which included the Compact and became effective at the same time as the Compact. 1968 Statutes of Nevada 14. Thus, the Legislature contemplated that counties in Nevada would be acting pursuant to the authority of NRS 278.010 to 278.630 in furtherance of the TRPA Compact and ordinances. Douglas County so acted in the present case. When a state political subdivision takes action in an area traditionally and expressly reserved for local governmental entities such as the issuance of a special use permit, merely because that action may be reviewable by a bi-state agency

[6]"278.025 Powers of regional planning agency created by interstate compact.

1. In any region of this state for which there has been created by interstate compact a regional planning agency, the powers conferred by NRS 278.010 to 278.630, inclusive, are subordinate to the powers of such regional planning agency, and may be exercised only to the extent that their exercise does not conflict with an ordinance or plan adopted by such regional planning agency. The powers conferred by NRS 278.010 to 278.630, inclusive, shall be exercised whenever appropriate in furtherance of a plan adopted by the regional planning agency."

should not preclude the application of a state statute of limitation, especially when the bi-state agency takes no action on the matter.

Petitioners' assertion that no notice of final action has been filed was also rejected by the Nevada Supreme Court in *League to Save Lake Tahoe v. TRPA, supra.*

There is sound policy behind a relatively short time period in which to seek judicial review of administrative decisions. An administrative action is entitled to the same degree of certainty and finality as judicial proceedings. NRS 278.027 recognizes and establishes that policy within the State of Nevada. An applicant should be entitled to rely on administrative action after a reasonable period of time. Four years is well beyond any reasonable period of time.

Petitioners cannot be heard to complain that the 25-day time limitation in NRS 278.027 is too short or that Petitioners have not had an opportunity to litigate Respondents' permits. As was pointed out by the Ninth Circuit, the 25 days is expanded by at least 60 days, thus giving 85 days from the action of the county in which to seek judicial review. In addition, each Petitioner commenced an action attacking the Administrative Permits of Respondents within the 25-day time limitation. See *State of California ex rel. Younger v. TRPA,* 516 F.2d 215 (9th Cir. 1975), cert. den. 423 U.S. 868; *League to Save Lake Tahoe v. TRPA,* 563 P.2d 582 (Nevada 1977); *League to Save Lake Tahoe v. TRPA,* 507 F.2d 517 (9th Cir. 1974); *League to Save Lake Tahoe v. TRPA,* 558 F.2d 914 (9th Cir. 1971).[7]

[7]The District Court held that the within action was also barred on the grounds of *res judicata* based on these decisions. It was not necessary for the Ninth Circuit to reach this issue.

Petitioners' assertion that the cases of *Holmberg v. Armbrecht*, 327 U.S. 392 (1946) and *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355 (1977) are applicable is also without merit. The within action is clearly not a Federal action enforcing Federal claims for equitable relief or seeking vindication of public rights.

In the present case, the Federal Court sits in the unique posture of preventing an impairment to the effective functioning of the Compact. That is the sole basis of Federal Court jurisdiction in matters relating to the TRPA ordinances. *League to Save Lake Tahoe v. BJK Corp.*, 547 F.2d 1072 (9th Cir. 1976). The Federal nature of the within action is tenuous at best. Merely because Congress approved the TRPA Compact as negotiated and drafted by the States of Nevada and California should not be sufficient to conclude that Congress intended that relevant and applicable state statutes of limitation do not apply to actions relating to judicial review of administrative action taken by political subdivisions of the respective States. The United States Congress had no hand in the drafting of any of the TRPA ordinances. No determination of Congressional intent can be obtained from the TRPA ordinances. Thus, the reasoning of the *Holmberg* and *Occidental Life* cases have no applicability to the present case.

The Ninth Circuit's ruling does not have far reaching Federal significance. Merely because NRS 278.027 applies to the administrative decision of Douglas County under the TRPA Compact and ordinances does not mean that state statutes of limitation are applicable in every circumstance under all other bi-state compacts. Each multi-state agreement is unique and must be governed by the

specific language of the particular compact or charter in question.

It is therefore respectfully submitted that the application of NRS 278.027 in the present case is not an important question of Federal law and that the Ninth Circuit did not err.

IV

THE COURT OF APPEALS CORRECTLY HELD THAT WHERE AN ALLEGED INTERSTATE NUISANCE IS ANTICIPATORY AND THE PROJECTS COMPLAINED OF WERE APPROVED UNDER AN INTERSTATE COMPACT ESTABLISHING ENVIRONMENTAL CONTROLS GOVERNING SAID PROJECTS, THE COMPLAINING STATE'S FEDERAL COMMON LAW NUISANCE CLAIM MAY BE DISMISSED ON THE PLEADING.

Neither the Compact nor the Land Use Ordinance was intended to be a no-development, no-growth measure. The Compact was enacted to establish an "area-wide planning agency to adopt and enforce a regional plan of resource conservation and *orderly development.*" Compact, Article I(c). Implicit in the Compact and its ordinances is a belief and an expectation of the States of Nevada and California that there would be additional people, both permanent and transient, and accompanying additional traffic, in the Tahoe Basin. Lake Tahoe is indeed a national treasure, and both Nevada and California recognized its continuing magnetic attraction for all types of people from both states, the entire nation and indeed the world. The principal concern of the Compact was and is to recognize that reality, and

to establish a "broad and comprehensive scheme and plan" for effective environmental controls in the Basin. A complex and demanding approval process requiring intense interaction between Counties, the States and the governing Agency was therefore established. The very heart of the approval process is a concern for the protection of each State and all citizens against unnecessary degradation of the air, water and resources of the area.

Each project complained of by the Petitioners went through the intricate "gauntlet of approval established by the Compact and the ordinance." (App. A., p. 24). Belatedly, to say the least, the Petitioners asserted that the hotels and parking structures in question "indirectly will create a nuisance . . . that they will attract more people and cars to the Basin and that inevitably a nuisance will result." (App. A., p. 24). The District Court did not agree, nor did the Ninth Circuit.[8]

Petitioners cannot cite to this Court a single case where a State has been allowed to bring a Federal common law nuisance action when, as in the present case, the alleged nuisance is wholly anticipatory, wholly speculative and wholly indirect and, moreover, where the complaining State is a party to an Interstate Compact establishing a scheme of controls concerning the very environmental results complained of.

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[8]Petitioners have not even included copies of their respective Complaints in the Petition to this Court. In this respect, the Petition fails to afford the Court an adequate record upon which to assess the correctness of the Ruling of the District Court and the Ninth Circuit that the interstate nuisance claim does not state a claim for which relief can be granted.

In a setting such as the present one, involving as it does the balance of delicate interstate interests in an instrument the product of massive legislative hearings in Nevada and California, the Courts should not invoke equitable jurisdiction on the basis of a conjectural, speculative and premature claim of nuisance. The proposed facilities may be built and so operated (and are intended to be so built and operated by these Respondents) as not to be or cause a nuisance, and thus, it cannot be said *that at all times and under any circumstances, they may constitute a nuisance. Ryan v. Pitkin Iron Corporation,* 444 F.2d 717 (1971). Whether a particular thing is or may become a nuisance is to be determined, not by an abstract consideration but by considering it in connection with the circumstances and the locality. *Village of Euclid v. Ambler Realty Company,* 272 U.S. 365, 47 S.Ct. 114 at 118 (1926).

The Ninth Circuit and the District Court correctly and appropriately weighed the claim of alleged interstate nuisance against the backdrop of "circumstances and locality." Indeed, the operation of the Compact has great influence upon the factors that should be weighed in applying Federal Common law nuisance doctrines and principles. (App. A., at p. 22).

The location is Lake Tahoe. The predominant circumstance is that two sovereign states have entered into an agreement, elevated to the status of Federal law, requiring that new construction projects may proceed only after an exhaustive environmental approval process. If approved, this "orderly development" has been acquiesced in by both parties as a reality of the Basin to be accomplished at such mutually acceptable "injury levels" as are occasioned by

any construction project. The projects in question are in compliance with the goals, standards and requirements of that agreement of the States. There is no credible evidence in the record or elsewhere to support the proposition that they will create an "interstate nuisance." Indeed, if there were such evidence, whether preponderant or clear and convincing, then the holder of every single approved construction permit in the Basin, of whatsoever type or nature, is also an inseparable and integral part of the interstate nuisance threat and should have been joined in this action to be enjoined from construction activity. Hotel-casino developments obviously do not pre-empt the broad scope of construction activity in the Basin, nor are they the sole actors upon the potential, speculative nuisance stage. These observations are common sense, and were obviously in the mind of the Ninth Circuit in its "locality and circumstances" considerations.

Nor does the result in *Illinois v. City of Milwaukee,* ..... F.2d ..... (No. 77-2246, April 26, 1979) (App. H) dictate otherwise. That case is clearly distinguishable. The facts there presented revealed a clear, existing, direct and continuing interstate nuisance having serious and immediate impact upon the health of human beings. In the *Illinois* case, Judge Tone stated,

> "The District Court found that the defendants dump substantial quantities of pathogen-containing sewage into Lake Michigan each year, that the lake currents carry the pathogens into Illinois waters, where that may infect drinking water supplies and pose a danger to swimmers, and therefore that the defendants' actions pose a significant risk of injury to Illinois residents." (App. H at p. 301)

The court referred to evidence supporting these findings which included the fact that the sewer system defendants operated had approximately 239 bypass or overflow points from which untreated sewage escapes to flow directly or indirectly into Lake Michigan or into rivers that empty into the Lake. In a single month in 1976, the untreated sewage discharged from just 11 of the 239 overflow points totalled 646.46 million gallons!

In the *Illinois* case, there was no allegation of "indirect pollution" that "might be caused" by more people and automobiles coming into a resort area. In the instant case, the Petitioners do not seek to stop an *existing* activity on the part of Respondents constituting a nuisance extending across state boundaries. Instead, they sought to enjoin a *threatened* or *apprehended* nuisance. Furthermore, in the *Illinois* case, there was no Interstate Compact in existence, addressing itself to the identical matters complained of, which required consideration in weighing the nature of the prospective harm. There is, indeed, a clear distinction between "high-rise hotels and their occupants" clearly contemplated under an interstate agreement and unconsented, unwarranted and inherently dangerous untreated sewage, noxious gases and poisoned pesticides. (App. A., p. 26).

Petitioners could not and cannot present in this case facts which warrant the application of Federal common law nuisance doctrines. Such facts and allegations as they assert are, to a great degree, identical to and the sum and substance of the approval process environmental considerations. Such injury to the environment as they posit is of the type and degree allowed under the Compact as

an expectable, realistic result of "orderly development." To ask of this Court or the Ninth Circuit to rule otherwise under these circumstances and to invoke Federal common law nuisance doctrines is to countenance selective action against a single element of a class (*i.e.* hotel-casino projects); is to allow a forum for "crystal-ball gazing" as to what the future may or may not portend in the Tahoe Basin; and more importantly, is to render the good-faith agreement of two sovereign states a nullity by allowing on the request of one State a judicial "re-write" of a Compact which has and should continue to have the highest degree of sanctity of contract, to be amended only by the consent of the parties and Congress.

The Respondents therefore submit that the Ninth Circuit correctly ruled upon the Federal interstate nuisance allegation and claim. The present facts and the foreseeable facts do not yield even the minimal "appropriate situation" in which such an action may be maintained.

CONCLUSION

This case is another in a continuing series of harassing litigation brought by Petitioners against Respondents over the last five years. It lacks merit; it does not involve an important question of Federal law; it does not conflict with a decision of another Court of Appeals. This is not an appropriate case for this Court to exercise its discretionary review authority. It is therefore respectfully submitted that the Petition For Writ of Certiorari be denied.

Dated, 3 August 1979.

LAXALT AND BERRY
One East Liberty Street
Reno, Nevada 89501
Attorneys for Respondent Harvey's Wagon Wheel, Inc.

MICHAEL ROWE
Douglas County District Attorney
Courthouse
121 Eighth Street
Minden, Nevada 89423
Attorney for Respondent Douglas County

McDONALD, CARANO, WILSON, BERGIN, BIBLE, FRANKOVICH & HICKS
241 Ridge Street
P.O. Box 2670
Reno, Nevada 89505
Attorneys for Respondent Ted Jennings

BREEN, YOUNG, WHITEHEAD, TERZICH & BELDING
232 Court Street
Reno, Nevada 89501
Attorneys for Respondent Oliver Kahle

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

No. 79-15

CALIFORNIA TAHOE REGIONAL PLANNING AGENCY, a Political Subdivision of the State of California, PEOPLE OF THE STATE OF CALIFORNIA, LEAGUE TO SAVE LAKE TAHOE, and SIERRA CLUB,

Petitioners,

v.

TED JENNINGS, OLIVER KAHLE, HARVEY'S WAGON WHEEL, INC., and COUNTY OF DOUGLAS, a Political Subdivision of the State of Nevada,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

E. ROBERT WRIGHT
Office of the Attorney General
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 445-3323
Attorney for Petitioners
California Tahoe Regional
Planning Agency, and People of
the State of California

GEORGE DEUKMEJIAN,
Attorney General of the
State of California
ROBERT HARVEY CONNETT
and E. CLEMENT SHUTE, JR.,
Assistant Attorneys
General, Of Counsel

LAURENS H. SILVER
SIERRA CLUB LEGAL
DEFENSE FUND, INC.
311 California Street, Suite 311
San Francisco, California 94104
Telephone: (415) 398-1411
Attorney for Petitioners
League to Save Lake Tahoe,
and Sierra Club

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Respondents.

PETITIONERS' REPLY BRIEF

CORRECTION TO STATEMENT OF THE CASE

Respondents state (at p. 3) that they filed Motions for Summary Judgment as well as Motions to Dismiss the Complaint, in the District Court. This is not correct. Respondents Jennings, Kahle, Harvey's, and Douglas County, filed Motions to Dismiss only. (Record). *See,* App. A to Petition (Ninth Circuit Opinion at p. 4–5).

I., II. BY FAILING TO REVIEW THE ABSENCE AND ADEQUACY OF THE "FINDINGS" MADE BY THE APPROVING AUTHORITY, THE COURT OF APPEALS RELEGATES CRITICAL ISSUES TO POTENTIALLY CONFLICTING INTERPRETATIONS BY DIFFERENT STATES, AND IGNORES THE PRINCIPLES WHICH SUGGEST REQUIRING REASONED FINDINGS TO SUSTAIN

ADJUDICATORY DECISIONS UNDER INTERSTATE REGULATIONS.

The assertion by respondents (at p. 8) that the continuation of "differences in the procedures and the laws applicable to the various political subdivisions surrounding Lake Tahoe" is intended by the Compact, is in fact directly contrary to the actual intent. "[T]he political fragmentation in the basin has prevented a unified and organized approach to the mounting problems." S. Rep. 91–510, 91st Cong., 1st Sess. (1969) appearing at 115 Cong. Rec. 3308–3309 (1969). These concerns lead directly to the Compact and are reflected in the policy sections: "the region is experiencing problems of resource use and deficiencies of environmental control" and "it is imperative that there be established an areawide planning agency with power to adopt and enforce a regional plan". Compact, Art. I.

Respondents contend (at p. 5–6) that under the Compact, procedures are left to the local jurisdictions. It is indisputable however, that the TRPA land use ordinance established both substantive and procedural standards. Sections 7.13 and 8.33 require the determination and finding of specified conditions. Section 4.00 is entitled "Permit Procedure". Sections 4.22 and 8.27 require the applicant to furnish specified information, and section 4.33 requires the TRPA to furnish assistance to local authorities in interpreting the ordinance. The answer to the question of whether findings are required to sustain adjudicatory approvals, clearly is to be found in the TRPA ordinance, and is not left to the numerous and

diverse state and local jurisdictions in the Tahoe Basin.

Clearly, the projects in issue are in seeming violation of § 7.13 and § 8.33 of the TRPA Land Use Ordinance. Section 8.33 prohibits "*any* substantial harmful environmental consequences." Respondents' own submissions in the Administrative Record conceded harmful environmental impacts, including causing the violation of applicable federal air quality standards. (Petition, at p. 29). Section 7.13 prohibits height greater than 40 feet unless the greater height "will better promote the protection of the environment". In reviewing these projects, the TRPA staff found "The opposite is true in that the combination of high intensity of use, maximum land coverage and excess building height degrades the environment." (Record, pl. exh. 2, doc. no. 16 at p. 5; pl. exh. 3, doc. no. 20 at p. 6; Reporters tr. at 189, 221–222).

In light of the facial inconsistency of the projects with TRPA's ordinance, the requirement for explanatory findings is no mere technicality but is instead essential in order "to exercise effective environmental controls", Compact, Art. I(c).[1]

Respondents cite (at p. 10) *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), but that decision actually lends them no support at all. *Overton Park* in-

[1] Respondents refer to a "voluminous" record (p. 9), but neither make citations to the record or refer to any evidence in the record to support the administrative decisions made. With respect to respondents' "exhaustion" argument (p. 9), no notice of the Douglas County proceedings was ever given to any of the respondents. Respondents participated in the TRPA review proceedings. California not only has a right, it has the duty, to enforce the TRPA Land Use Ordinance. Compact, Art. VI(b).

volved a "nonadjudicatory, quasi-legislative" hearing. *Id.* at 415. The case concerned road location decisions under statutes requiring that roads not be constructed through parks unless certain conditions were met. "This language is a plain and explicit bar to the use of federal funds for construction of highways through parks—only the most unusual situations are exempted." *Id.* at 411. The Court even though informal action was involved, and though the statute was not framed in terms of findings, nevertheless required the making of an adequate record for judicial review.

The two cases cited by respondents (at p. 10) to show that Nevada follows the "implied findings" doctrine are inapplicable. Both cases concerned appellate review of lower judicial decisions. *See, Dutertre* v. *Shallemberger,* 34 P. 449 (Nev. 1893) (ejectment); *Buchanan* v. *Buchanan,* 523 P.2d 1 (Nev. 1974) (divorce). Contrary to respondents' assertions, the Nevada state courts have required findings and substantial evidence to sustain adjudicatory zoning decisions. *See, State ex. rel. Johns* v. *Gragson,* 515 P.2d 65, 67 (Nev. 1973); *City of Henderson* v. *Henderson Auto Wrecking,* 359 P.2d 743, 745 (Nev. 1961).

III. THE COURT OF APPEALS ERRED IN HOLDING THAT THIS FEDERAL ACTION IS BARRED BY THE NEVADA 25-DAY STATUTE OF LIMITATIONS.

It is not surprising that a number of lawsuits followed the unexplained approval of large projects seemingly inconsistent with TRPA's regulations.

The administrative process did not become final until TRPA default approval. This occurred on September 15, 1973, with respect to Harvey's, and August 16, 1974, with respect to Jennings and Kahle. *See League to Save Lake Tahoe v. Tahoe Reg. Pl.,* 563 P.2d 582, 584–85 (Nev. 1977). A federal court lawsuit was commenced against Harveys on September 20, 1973, which was twice dismissed. Both dismissals were later reversed. *See, League to Save Lake Tahoe* v. *Tahoe Regional Planning Agency,* 507 F.2d 517 (9th Cir. 1974), *cert. denied,* 420 U.S. 974 (1975); 558 F.2d 914 (9th Cir. 1977). On August 16, 1974, a case was filed in the Nevada state courts entitled *League to Save Lake Tahoe* v. *Tahoe Reg. Pl., supra,* against all of the respondents. That case attempted to litigate the TRPA ordinance issues raised in this case. The procedural dismissal however was affirmed. 563 P.2d 582 (Nev. 1977). Petitioner CTRPA attempted to file a comprehensive brief on the merits (Record, Def. exh. 35, Reporters tr. at 231) on June 4, 1975, discussing the same authorities relied upon below in this later federal suit. While the trial court dismissed the state court action on September 12, 1975, the federal court in Nevada had held on June 24, 1975 that there was no federal jurisdiction over these kinds of claims. That decision was not reversed until December 8, 1976, in *League to Save Lake Tahoe* v. *B.J.K. Corp.,* 547 F.2d 1072 (9th Cir. 1976).

The final Nevada state court decision was not rendered until May 3, 1977. A federal action raising the TRPA ordinance claims was not maintainable under the highest decision then applicable until December of

1976, and also would have been subject to abstention, abatement or discretionary dismissal while the state court action was pending.[2] *See, Fay* v. *Fitzgerald,* 478 F.2d 181 (2nd Cir. 1973) (discretionary dismissal).

The complexity of the Compact issues involved, changes in the law, and intervening decisions, create a situation in which the Nevada limitation statute should not be unnaturally distorted *post hoc,* to bar this action. Petitioners have proceeded in an orderly fashion in a so far vain attempt to prevent what they consider to be clear violations of governing interstate regulations.

NRS Ch. 278.025 (cited at p. 14) adds no support to respondents' position. It very clearly subordinates local jurisdictions in the Tahoe Basin to the TRPA. In arguing that the permits they received are variances authorized by NRS 278.010 to 278.630 so that the limitation in NRS 278.027 is applicable, respondents seek the benefit but not the burden of such interpretation. The Douglas County zoning ordinance (No. 167) requires commencement of construction of variances within six months, and completion within one year. (Record, pl. exh. 9, Art. 30 H.1 at p. 36; Reporters tr. at 194, 223).

Clearly, there has been no reliance here. Respondents were advised long ago of the claims raised, through prior litigation dismissed as a result of their own tactics. No compelling reason is presented to support both the ex-

[2] The period for appealing or petitioning for writ of certiorari pursuant to 28 U.S.C. § 1257, on the theory that the state limitation statute offends the compact or a federal claim had been disposed of, did not end until August 1, 1977.

pansion of the Nevada limitation statute to include Compact matters not included in the enumerated sections, and the ignoring of the notice filing requirement.

IV. THE COURT OF APPEALS ERRED IN HOLDING THAT BECAUSE THE ALLEGED NUISANCE IS ANTICIPATORY AND WAS APPROVED PURSUANT TO COMPACT, A STATE'S FEDERAL COMMON LAW NUISANCE CLAIM MAY BE DISMISSED ON THE PLEADING.

If it is true that petitioners have not cited a single case allowing the bringing of an anticipatory federal common law nuisance action in a Compact situation (p. 18), it is equally true that respondents cite no case not allowing such an action. A major basis for the petition is that inter-state obligations are a critical area of concern to this Court, and that this case presents critical issues which are not settled. Answers to questions such as "do states waive their common law rights when they agree to compacts" or "is there a general rule requiring findings to sustain interstate adjudicatory decisions", are essential to the effective functioning of the Compact mechanism in dealing with specific regional problems.

The contention that it is necessary to show that a nuisance will necessarily result is simply wrong given the stage of the proceedings. The Ninth Circuit quoted language from *Missouri* v. *Illinois & Chicago District,* 180 U.S. 208, 248 (1901) ending with "the proofs must show such a state of facts as will manifest the danger to be *real and immediate.*" (Petition, App. A at p. 24). The Ninth Circuit left out the very next, all-important line which

states: "But such observations are not relevant to the case as it is now before us [demurrer]". 180 U.S. at 249.

Respondents' reliance (at p. 19) on *Ryan* v. *Pitkin Iron Corp.*, 444 F.2d 717 (10th Cir. 1971), is misplaced. That case was decided under Colorado, not federal, law. Even more importantly, the case concerned a sewage plant wherein manner of operation is critical to the presence or absence of nuisance conditions.

Here, the allegations are that the Tahoe Basin simply lacks the capacity to absorb the large volume of traffic and other problems to be generated by respondents' projects. Kahle's representative stated during the Douglas County proceedings that "as a 'rule of thumb' each hotel room generates about 10 cars a day. This includes gaming, service and other traffic as well." (Petition, App. F at p. 245). That one project (Hotel Oliver) would have 960 hotel rooms.

It is obviously the intention of respondents to attract the visitors and their attendant incidental effects including automobile traffic, that the projects are designed to accommodate. Unlike issues concerning the operation of a sewage plant (e.g., odor, degree of treatment), manner of operation is not dispositive of the question of whether the type of nuisance alleged will occur.

The effects on California of respondents' projects are most direct. Respondents' representative stated in the Administrative Record that it is necessary for most (two-thirds to three-fourths) of the hotel-casino employees to find housing in California. (Petition, App. F at p. 244, 252). Respondents' projects, adjacent to California, will

burden California directly in terms of air pollution, housing demands, sewage demands, transportation demands, and directly and adversely affect the ability of California to protect that part of the Tahoe Basin located in California.

Accordingly, California should have a trial on the merits to determine its substantial common law nuisance claims. While the exact situation is novel, the principles enunciated by this Court in the nuisance cases cited in the Petition, are clearly applicable to this situation.

CONCLUSION

Respondents have been unable to effectively minimize the obvious importance of this case. It is therefore respectfully submitted that the writ of certiorari should issue.

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Respectfully submitted,

E. ROBERT WRIGHT
Office of the Attorney General
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 445-3323
Attorney for Petitioners
California Tahoe Regional
Planning Agency, and People
of the State of California

LAURENS H. SILVER
SIERRA CLUB LEGAL
DEFENSE FUND, INC.
311 California Street, Suite 311
San Francisco, California 94104
Telephone: (415) 398-1411
Attorney for Petitioners
League to Save Lake Tahoe
and Sierra Club

GEORGE DEUKMEJIAN,
Attorney General of the
State of California
ROBERT HARVEY CONNETT and
E. CLEMENT SHUTE, JR.,
Assistant Attorneys
General, Of Counsel